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**TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM ██████████ 1954**

**No. ██████████ 14**

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**FIBREBOARD PAPER PRODUCTS CORPORATION,  
PETITIONER,**

**vs.**

**NATIONAL LABOR RELATIONS BOARD, ET AL**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**PETITION FOR CERTIORARI FILED NOVEMBER 8, 1963**

**CERTIORARI GRANTED JANUARY 6, 1964**

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**UNITED STATES COURT OF APPEALS  
For the District of Columbia Circuit**

**September Term, 1962**

**No. 17,275**

**East Bay Union of Machinists, Local 1304, United  
Steelworkers of America, AFL-CIO and United  
Steelworkers of America, AFL-CIO, v. National  
Labor Relations Board**

**No. 17,468**

**Fibreboard Paper Products Corporation, v. Na-  
tional Labor Relations Board**

**Before: Wright, Circuit Judge, in Chambers.**

**ORDER**

The parties of the above-entitled cases having submitted a prehearing stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, except that if the petitioner in case No. 17,468 desires to intervene in case No. 17,275, it shall file a motion for leave to do so in conformity with Rule 38(f) of said Rules, and it is

ORDERED that the stipulation shall control further proceedings in these cases unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

No extensions of time for filing the briefs of the parties will be granted except for extraordinary and unforeseeable cause shown.

Dated: Dec. 20, 1962.

**UNITED STATES COURT OF APPEALS  
For the District of Columbia Circuit**

**[Caption Omitted]**

**PREHEARING CONFERENCE STIPULATION**

Pursuant to Rule 38(k) of the Rules of this Court, the parties, subject to this Court's approval, hereby stipulate and agree as follows with respect to the parties, issues, and the procedure and dates for the filing of briefs and joint appendix.

**I. The Parties**

The petitioning company shall be permitted to intervene in Case No. 17,275 and the petitioning unions to intervene in Case No. 17,468.

**II. Issues**

1. Whether the Board's conclusion that Fibreboard was guilty of a refusal to bargain with the charging unions over its decision to contract out the maintenance work at its Emeryville plant (a) is adequately supported by findings of fact and (b) is supported by substantial evidence on the record as a whole.

2. Whether Fibreboard was under a duty to bargain with the charging unions over its decision to contract out the said maintenance work.

3. Whether the Board erred or exceeded its powers in ordering that Fibreboard resume its said maintenance operations and reinstate the individuals formerly employed therein with backpay from the date of the supplemental decision and order.

4. Whether the Board erred or exceeded its powers in granting the charging unions' petition for reconsideration and modifying its original decision and order without having given notice of its intention to do so and without having afforded an opportunity for hearing upon the proposed modification and whether the proceedings had before the Board were valid and proper.

5. Whether the Board acted upon the petitions or motions for reconsideration of its original decision and order and issued

its supplemental decision and order with reasonable dispatch as required by the Administrative Procedure Act.

6. Whether the Board abused its discretion under Section 10(c) of the Act by failing to order backpay to employees displaced by Fibreboard's contracting out of the maintenance work from the date of their displacement to the date of the Board's supplemental decision and order.

7. Whether the Board should have found that Fibreboard violated Section 8(a)(3) of the Act as alleged by the complaint.

### **III. The Briefs and the Joint Appendix**

1. The record in this case shall be reduced to a joint appendix comprising the materials each party designates. Fifty copies of the record shall be printed under this stipulation; the required number of copies to be filed with the Court and the remaining copies to be divided among the parties.

2. Petitioners shall designate those portions of the record required to be printed by the Rules of Court and the additional portions of the record on which they rely, with the cost of printing these materials to be divided between them equally. The Board shall designate such additional material as it wishes to have printed and shall bear the cost of printing the material which it designates. The printer shall allocate these costs, as well as necessary mailing charges, and shall submit bills to each party.

3. The Unions shall serve their designation on the other parties on or before December 29, 1962; the Company shall serve its counter-designation on or before January 8, 1963; and the Board shall serve its counter-designation on or before January 18, 1963.

4. The Unions shall have responsibility for printing the joint appendix which they shall file, together with their brief, on or before February 18, 1963.

5. The Company's brief shall also be due on February 18, 1963.

6. The Board's brief shall be due on March 20, 1963.

7. Petitioners may file reply briefs on or before April 10, 1963.

8. It is further agreed that the parties and the Court may refer to any portion of the original transcript of record which has not been printed or reproduced, it being understood that any portions of the record thus referred to will be printed in a supplemental joint appendix if the Court so directs.

JERRY D. ANKER,  
Attorney for the Unions

GERARD D. REILLY  
Attorney for the Company

MARCEL MALLET-PROVOST  
Assistant General Counsel  
National Labor Relations Board

Dated at Washington, D. C., this 19th day of December, 1962

**UNITED STATES OF AMERICA**  
**Before the National Labor Relations Board**  
**[Caption Omitted]**

**[AMENDED] COMPLAINT AND NOTICE OF HEARING**

It having been charged by United Steelworkers of America, AFL-CIO, and East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, herein collectively called Steelworkers, that Fibreboard Paper Products Corp., herein called Respondent, has been engaging in, and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 7, as amended:

**I**

A copy of the charge filed on July 31, 1959, was served by registered mail upon Respondent on August 3, 1959.

**II**

Respondent, a Delaware corporation, is engaged in the manufacture of paint, linoleum floor covering and tile, roofing and insulation materials and has establishments in various parts of the country. The establishment involved in this proceeding is located at Emeryville, California, and is known as Pabco Division. During the past year Pabco Division of Respondent has, in the course and conduct of its business, caused to be sold and transported from its plant products valued in excess of \$1,000,000 to points outside the State of California. During the same period of time it has purchased and caused to be sent to it from points outside the State of California raw materials valued in excess of \$1,000,000.

**III**

United Steelworkers of America, AFL-CIO, and East Bay Union of Machinists, Local 1304, United Steelworkers of Amer-



ica, AFL-CIO, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

#### IV

All maintenance mechanics and machinists, their helpers, working foremen, and firemen and engineers employed in the powerhouse, and the storekeeper in the central supply and store room of Respondent employed at its Pabco Division plant at Emeryville constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

#### V

At all times material herein Steelworkers have been the representative for the purpose of collective bargaining of a majority of the employees in the unit described in paragraph IV, above, and by virtue of Section 9(a) of the Act have been and are now the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

#### VI

The most recent of a series of collective bargaining contracts between Respondent and Steelworkers was effective from August 1, 1958, to and including July 31, 1959. On May 26, 1959, Steelworkers, acting pursuant to the terms of this contract, served upon Respondent notice of a desire to modify. Proposals for modifications were thereafter submitted by Steelworkers and repeated requests for meetings were made, but no negotiation meeting took place until July 30, 1959.

#### VII

On or about July 27, 1959, Respondent entered into an oral understanding to take effect August 1, 1959, with Fluor Maintenance, Incorporated, herein called Fluor, whereby Fluor, acting as an independent contractor, supplying its own employees, did undertake to perform all of the maintenance and powerhouse work, including all work theretofore performed by employees of Respondent in the unit described in paragraph IV, above.

**VIII**

On or about July 27, 1959, Respondent notified Steelworkers of its understanding with Fluor, and that on July 31, 1959, employees covered by its contract with Steelworkers would no longer be employed.

**IX**

On or about July 30, 1959, Respondent notified Steelworkers that the contract described in paragraph VI, above, would terminate July 31, 1959, and that, since thereafter it would have no employees in the unit covered by the contract, negotiations for a renewed agreement would be pointless.

**X**

On May 26, 1959, Steelworkers gave the notices of dispute required by Section 8(d)(3) of the Act to the Federal and State Mediation Service. At no time were such notices given by Respondent.

**XI**

On July 30, 1959, Respondent terminated all employees in the unit described in paragraph IV, above, and immediately thereafter commenced to carry on its maintenance operations in accordance with the terms of the agreement described in paragraph VII, above.

**XII**

By the acts and conduct set forth in paragraphs VIII, IX, X, and XI, above, occurring in conjunction with the matters set forth in paragraphs VI, VII, and VIII, above, Respondent has failed to fulfill its statutory duty to bargain as set forth in Section 8(d) of the Act and thereby has refused, and does now refuse, to bargain collectively with the Steelworkers as the exclusive representative of its employees in the unit described in paragraph IV, above.

**XIII**

By the acts set forth in paragraphs VIII, IX, X, and XI, above, occurring in conjunction with the matters set forth in paragraphs VI, VII, and VIII, above, Respondent did refuse,

and continues to refuse to bargain collectively with the Steelworkers and thereby did engage in, and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

#### XIV

By the acts and conduct set forth in paragraphs VIII, IX, X, and XI, above, occurring in conjunction with the matters set forth in paragraphs VII and VIII, above, Respondent did discriminate, and is discriminating in regard to the hire, tenure, terms or conditions of employment of the employees employed in the unit described in paragraph IV, above, thereby discouraging membership in Steelworkers, and Respondent did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8(a) (3) of the Act.

#### XV

By the acts described above in paragraphs VIII, IX, X, and XI, occurring in conjunction with the matters set forth in paragraphs VII and VIII, above, Respondent did interfere with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in, and is thereby engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

#### XVI

The activities of Respondent described above in paragraphs VI through XI, above, occurring in connection with the operations of Respondent described in paragraph II, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

#### XVII

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a) (1), (3), and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 21st day of Sep-

tember, 1959, at ten o'clock in the forenoon, Pacific Daylight Saving time, in Room 720, 830 Market Street, San Francisco, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Complaint within ten (10) days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, on this 2nd day of September, 1959, issues this Complaint and Notice of Hearing against Fibreboard Paper Products Corp., the Respondent named herein.

GERALD A. BROWN

Regional Director  
National Labor Relations Board  
Twentieth Region  
830 Market Street  
San Francisco, California

**UNITED STATES OF AMERICA**  
**Before the National Labor Relations Board**

**[Caption Omitted]**

**[AMENDED] ANSWER OF FIBREBOARD PAPER  
PRODUCTS CORPORATION TO COMPLAINT**

Respondent Fibreboard Paper Products Corporation answers the Complaint heretofore issued herein as follows:

**I**

Respondent admits the allegations of paragraphs I, II and III of said Complaint.

**II**

Respondent admits all of the allegations contained in paragraph IV of said Complaint as amended.

**III**

Answering paragraph V of said Complaint, respondent admits and alleges that at all material times mentioned in the Complaint, maintenance employees of respondent at its Pabco Division Plant employed as steamfitters have been represented for purposes of collective bargaining by the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, Local Union 342; that at all of said times maintenance employees of respondent at its said plant employed as riggers have been represented for the purposes of collective bargaining by the International Association of Bridge, Structural, Ornamental, Reinforced Iron Workers, Riggers, Stone Derrickmen, Machinery, House Movers, and Sheetters, Local Union 378; that at all of said times maintenance employees of respondent at its said plant employed as carpenters have been represented for purposes of collective bargaining by the Bay Counties District Council of Carpenters, Local Union 36, of the United Brotherhood of Carpenters and Joiners of America; that at all of said times maintenance employees of respondent employed at said plant as electricians have been represented for purposes of collective bargaining by Local Union No. 595 of the International Brotherhood of Electrical Workers; and that at all of

said times employees of respondent at its said plant employed in the unit described in paragraph IV of the Complaint as amended have been represented for the purpose of collective bargaining of a majority of said employees by East Bay Union of Machinists, Local 1304, United Steel Workers of America (hereinafter called Steelworkers). Respondent denies all of the allegations of said paragraph V not herein expressly admitted.

#### IV

Answering paragraph VI of said Complaint, respondent admits and alleges that the most recent of a series of collective bargaining contracts between respondent and Steelworkers was effective from August 1, 1958, to and including July 31, 1959; that on May 26, 1959, Steelworkers, acting pursuant to the terms of said contract, served upon respondent a notice of which a true copy is hereto attached as Exhibit A; that contract proposals were submitted by Steelworkers by letter dated June 15, 1959; that negotiating meetings took place on July 27, 1959, July 30, 1959, and August 21, 1959, and that respondent bargained with Steelworkers regarding all matters as to which bargaining was requested. Respondent denies all of the allegations of said paragraph VI not expressly herein admitted.

#### V

Answering paragraph VII of said Complaint, respondent admits and alleges that on July 27, 1959, respondent decided to contract out all of the maintenance and powerhouse work at its Emeryville Plant, effective August 1, 1959; that on July 28, 1959, it selected Fluor Maintenance, Incorporated (hereinafter called Fluor) as the contractor and entered into negotiations with Fluor for a written contract; and that on August 4, 1959, respondent and Fluor executed a contract in writing whereby Fluor, acting as an independent contractor supplying its own employees, did undertake to perform, commencing as of August 1, 1959, all of the said maintenance and powerhouse work, including all work theretofore performed by employees of respondent theretofore represented by Steelworkers as set forth in paragraph III above. Respondent denies all of the allegations of said paragraph VII not herein expressly admitted.



## VI

Answering paragraph VIII of said Complaint, respondent admits and alleges that on July 27, 1959, respondent met with Steelworkers and advised Steelworkers that it intended to contract out said maintenance and powerhouse work commencing August 1, 1959, and further advised Steelworkers that effective with shifts commencing after midnight, July 31, 1959, employees theretofore employed by respondent in maintenance and powerhouse work, including employees covered by its said contract with Steelworkers, would be terminated and that respondent proposed to make provision for severance pay or termination allowances for employees so terminated; that on the same date, July 27, 1959, respondent mailed to Steelworkers letters of which true and correct copies are attached hereto as Exhibits B and C and handed copies thereof to representatives of Steelworkers; and that on July 28, 1959, respondent advised Steelworkers that it had selected Fluor as the contractor to perform said work. Respondent denies all of the allegations of said paragraph VIII not expressly herein admitted.

## VII

Answering paragraph IX of said Complaint, respondent admits and alleges that on or about July 29, 1959, respondent received from Steelworkers a letter of which a true and correct copy is attached hereto as Exhibit D, and that on July 30, 1959, respondent mailed to Steelworkers a letter of which a true and correct copy is hereto attached as Exhibit E; that on July 30, 1959, respondent met with Steelworkers; that Steelworkers demanded that respondent execute a new or renewed contract containing the modifications theretofore proposed by Steelworkers and that in response to said demand, respondent replied that since it would have no employees in the bargaining unit theretofore covered by said contract, negotiations for a renewed contract would be pointless. Respondent denies all of the allegations of said paragraph IX not herein expressly admitted.

## VIII

Answering paragraph X of said Complaint, respondent is without knowledge as to whether or not Steelworkers, on May 26, 1959, gave the notices of dispute required by Section



8(d) (3) of the Act to the Federal and State Mediation Services and for that reason denies the said allegation. Respondent admits that it did not give a notice of dispute to the Federal and State Mediation Services but denies that any such notice was required of it by Section 8(d) (3) of the Act.

### IX

Answering paragraph XI of said Complaint, respondent admits and alleges that effective with shifts commencing after midnight, July 31, 1959, it terminated all employees theretofore employed by it in maintenance and powerhouse work, including employees represented by Steelworkers as aforesaid; that at about 6:00 o'clock P.M., on July 31, 1959, Steelworkers established mass picket lines at and about said plant, and that from that date until August 18, 1959, Steelworkers, by means of mass picketing, violence and threats of violence, prevented employees of Fluor from entering said plant, with the result that no maintenance work was performed in said plant during said period; that on August 18, 1959, employees of Fluor gained access to said plant by the use of enclosed vans or trucks and that ever since said date last mentioned, maintenance operations in said plant have been performed by Fluor in accordance with the terms of said written contract mentioned in paragraph V above. Respondent denies all of the allegations of said paragraph XI not herein expressly admitted.

### X

Respondent denies all of the allegations contained in paragraphs XII, XIII, XIV, XV, XVI and XVII of said Complaint.

WHEREFORE, Respondent prays that it be hence dismissed.

MARION B. PLANT  
BROBECK, PHLEGER & HARRISON  
111 Sutter Street  
San Francisco 4, California  
Attorneys for Respondent  
Fibreboard Paper Products Corporation

**EXHIBIT A****District 38****UNITED STEELWORKERS OF AMERICA****AFL-CIO****610 Sixteenth Street • Rooms 219-220 Pacific Building****Oakland 12, California • Sub-District 3****Telephone TWIneaks 2-5486****Charles J. Smith, Director****May 26, 1959****Fibreboard Paper Products Corporation****P. O. Box 4317****Oakland 23, California****Attention: Mr. R. C. Thumann, Director of  
Industrial Relations****Gentlemen:**

Pursuant to the provisions of the Labor Management Relations Act, 1947, you are hereby notified that the Union desires to modify as of August 1, 1959 the collective bargaining contract dated July 31, 1958, now in effect between the Company and the Union.

The Union offers to meet with the Company at such early time and suitable place as may be mutually convenient, for the purpose of negotiating a new contract.

**Very truly yours,****UNITED STEELWORKERS OF AMERICA****By Wm. F. Stumpf, Representative****By Lloyd Ferber, Business Rep., Local 1304****cc. Charles J. Smith, Director****Local 1304****International—Pittsburgh**

**EXHIBIT B****FIRREBOARD****Paper Products Corporation****P. O. Box 4817 • Oakland 23, California**

July 27, 1959

Mr. Lloyd H. Ferber, Business Representative  
EAST BAY UNION OF MACHINISTS, LODGE 1304  
United Steelworkers of America, AFL-CIO  
3637 San Pablo Avenue  
Emeryville 8, California

**SUBJECT: EMERYVILLE PLANT AGREEMENT**

Under date of May 26, 1959, Mr. Ferber, you notified us of your desire to modify our collective bargaining agreement with your Union dated September 24, 1958, relative to maintenance employees at our Emeryville plant, and of your desire to meet for the purpose of negotiating a new contract to be effective August 1, 1959. Under date of June 15, 1959, you forwarded your contract proposals.

For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.

In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

R. C. Thumann  
Director of Industrial Relations

**EXHIBIT C****FIBREBOARD**

**Paper Products Corporation**  
**P. O. Box 4317 • Oakland 23, California**

July 27, 1959

Mr. Wm. F. Stumpf, Representative  
**UNITED STEELWORKERS OF AMERICA**  
610 Sixteenth Street—Rooms. 219-220  
Oakland 12, California

**SUBJECT: EMERYVILLE PLANT AGREEMENT**

Under date of May 26, 1959, Mr. Stumpf, you notified us of your desire to modify our collective bargaining agreement with your Union dated September 24, 1958, relative to maintenance employees at our Emeryville plant, and of your desire to meet for the purpose of negotiating a new contract to be effective August 1, 1959. Under date of June 15, 1959, you forwarded your contract proposals.

For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.

In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

R. C. Thumann  
Director of Industrial Relations

**EXHIBIT D****District 38****UNITED STEELWORKERS OF AMERICA****AFL-CIO**

810 Sixteenth Street • Rooms 19-220 Pacific Building  
Oakland 12, California • Sub-District 3  
Telephone TWinoaks 3-5486

Charles J. Smith, Director

July 29, 1959

Fibreboard Paper Products Corporation  
P. O. Box 4317  
Oakland, California

Attention: Mr. R. C. Thumann,  
Director of Industrial Relations

Gentlemen: Re: Subject: Emeryville Plant Agreement  
Reference is made to your letter of July 27, 1959.

We interpret your letter to mean that you are attempting to cancel your present agreement with us. If that is your intention, you are too late. We direct you to the provision of the agreement which requires that you should have given us at least sixty (60) days notice of cancellation prior to the July 31, 1959 expiration date.

In the absence of such notice, the contract has been automatically renewed for another year, subject, of course, to your obligation to meet with us at once to discuss the proposed modifications which we sent you, following our notice of May 26 for modifications of the existing agreement.

We trust that you will not lock out the employees covered by our agreement, and that you will not consummate the plan outlined in your letter of July 27th. We call upon you to meet with us at once.

Very truly yours,

**UNITED STEELWORKERS OF AMERICA,**

**AFL-CIO**

By Wm. F. Stumpf, Representative

By Lloyd Ferber, Business Rep., Local 1304

cc. Charles J. Smith, Director

Local 1304

International—Pittsburgh

Jay Darwin

**EXHIBIT E**

July 30, 1959

Messrs. Wm. F. Stumpf, Representative, and  
 Lloyd H. Ferber, Business Representative, Local 1304  
**UNITED STEELWORKERS OF AMERICA**  
 610 Sixteenth Street—Room 219-220,  
 Oakland 12, California

Gentlemen, the following is in reply to your letter of July 29, 1959.

1. The introductory provisions of our Agreement with your Union provide in pertinent part:

"This Agreement shall continue in full force and effect to and including July 31, 1959, and shall be considered renewed from year to year thereafter between the respective parties unless either party hereto shall give written notice to the other of its desire to change, modify, or cancel the same at least sixty (60) days prior to expiration."

Under date of May 26, 1959, you notified us of your desire to modify the Agreement and to meet with us for the purpose of negotiating a new Agreement to be effective August 1, 1959. Under the provision quoted above, our Agreement therefore will expire at midnight July 31, 1959, and will not be automatically renewed. See *American Woolen Company*, 57 N.L.R.B. 647. Our letter of July 27, 1959, was not an attempt to cancel the Agreement but was written in contemplation of the fact that it will, by its terms, expire at midnight, July 31, as set forth above.

2. Aside from the foregoing, the Agreement does not prohibit us from letting work to an independent contractor, and we have the right to do so. See *Amalgamated Association, etc. v. Greyhound Corporation*, 231 F(2d) 585.

3. While it will be necessary for us to lay off or terminate employees heretofore performing the work to be taken over by the contractor, we do not contemplate any lockout.

4. As we stated in our letter of July 27, it appears to us that since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless. However, we repeat that we will be glad to discuss with you at your convenience any questions that you may have.

**R. C. THUMANN**

Director of Industrial Relations

Charles J. Smith, International-Pittsburgh, Jay Darwin

**UNITED STATES OF AMERICA****Before the National Labor Relations Board****[Caption Omitted]****SUPPLEMENTAL DECISION AND ORDER**

On March 27, 1961, the Board issued a Decision and Order in this proceeding,<sup>1</sup> finding that the Respondent, Fibreboard Paper Products Corporation, had not committed unfair labor practices within the meaning of Sections 8(a) (1), (3) and (5) or Section 8(d) of the Act as alleged in the complaint, and dismissing the complaint.

On May 15, 1961, the Charging Unions filed a petition for reconsideration of the Board's Decision and Order, and on June 7, 1961, the General Counsel filed a motion for reconsideration and clarification. On May 25, 1961, the Respondent filed an answer to the Charging Party's petition for reconsideration, and on June 15, 1961, filed an answer to the General Counsel's motion.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

Upon consideration of the petition filed by the Charging Unions, the motion filed by the General Counsel, the answers filed by the Respondent, and the entire record in the case, including the exceptions and briefs heretofore filed, the Board hereby grants the Charging Unions' petition for reconsideration to the extent indicated below.<sup>2</sup>

In its original Decision and Order, a majority of the Board concluded that the Respondent did not violate Section 8(a) (5) when it unilaterally subcontracted its maintenance work for economic reasons without first negotiating with the duly designated bargaining agent over its decision to do so. In their

<sup>1</sup> 130 NLRB 1558. Member Fanning dissented. Chairman McCulloch and Member Brown took no part in that Decision.

<sup>2</sup> The Respondent's request for oral argument is denied as the record of the prior proceeding, together with the documents filed since issuance of the decision and order, adequately present the issues and the positions of the parties. On July 11, 1962, Respondent filed a petition to reopen the record for the introduction of further evidence relating to the reduction of its maintenance department work force. On July 16, 1962, the Charging Unions filed an opposition thereto. The Respondent's petition is denied as the issues raised therein are basically matters of compliance which are more properly treated at the compliance stage of the proceedings.



view, Respondent's decision to subcontract was a management prerogative having no impact on the conditions of employment within the existing maintenance unit, and hence need not have been submitted to the Charging Unions before that decision was effectuated. The dissenting opinion, relying on the Supreme Court's decision in *Telegraphers v. Chicago and N.W.R. Co.*, 362 U. S. 330, and related court and Board cases, held that an economic decision to subcontract unit work was encompassed within the term "wages, hours and other terms and conditions of employment" and was a mandatory subject of collective bargaining under the Act.

In the recent *Town and Country Manufacturing Company, Inc.*, 136 NLRB No. 111, the Board had occasion to re-examine this issue. A majority of the Board in that case concluded that a management decision to subcontract work out of an existing unit, albeit for economic reasons, was a mandatory bargaining subject. To the extent that the majority opinion in *Fibreboard* held otherwise, that holding was overruled. Accordingly, for the reasons and considerations expressed in *Town and Country*, and in the dissenting opinion in the original *Fibreboard* case, we find that Respondent's failure to negotiate with the Charging Unions concerning its decision to subcontract its maintenance work constituted a violation of Section 8(a) (5) of the Act.

The issue in this case is *not*, as stated in the dissent, "whether business management is free to subcontract work in the interest of the more efficient operation of its business." Nor is the Board majority holding, anymore than it did in the *Town and Country* case, that a decision to subcontract is foreclosed to management unless it is a negotiated decision satisfactory to the union.

The Board majority stated explicitly in the *Town and Country* case<sup>3</sup> that the duty to bargain about a decision to subcontract work

in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment. Experience has shown, however, that candid discussion of mutual problems by labor and management

<sup>3</sup> 136 NLRB No. 111 at p. 7.

frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. But it commands no less.<sup>4</sup>

Our dissenting colleague suggests that the Board should exercise its discretion in this case by finding that an employer's decision to subcontract work theretofore performed by its employees is not a mandatory subject of bargaining. We do not, however, believe that the issue presented is one within the Board's discretion. In our opinion, the question is foreclosed by the Supreme Court's decision in the *Telegraphers*<sup>5</sup> and other cases.<sup>6</sup>

In *Telegraphers*, the union notified the railroad under §6 of the Railway Labor Act, 45 U.S.C. §156,<sup>7</sup> that it wanted to negotiate with the railroad to amend the current bargaining agreement by adding the following rule:

No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization.

Insofar as here pertinent, the railroad contended that the union's demand did not raise a bargainable issue and refused to negotiate. The District Court held that the contract proposal related to the statutory "rates of pay, rules and working conditions" and was therefore subject to the bargaining obli-

<sup>4</sup> In the original *Fibreboard* case, Member Fanning similarly said in his dissent (130 NLRB 1558, 1565):

Clearly, this duty to bargain [about the decision to subcontract] is not an order restraining the employer from subcontracting such work. The duty to bargain does not include an obligation to yield. Had the employer bargained about its decision to subcontract the maintenance work in the instant case, it is entirely possible that the parties could have arrived at a solution to the problem short of subcontracting the entire maintenance operation. It seems to me that this possibility is the goal of sound collective bargaining, which the Act is designed to foster and encourage.

<sup>5</sup> *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U. S. 330.

<sup>6</sup> *Teamsters Union v. Oliver*, 358 U. S. 283; 362 U. S. 605; *Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574.

<sup>7</sup> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions . . . ." (Emphasis supplied)

gations under the Railway Labor Act.<sup>8</sup> On appeal the Court of Appeals reversed, holding that the finding that the proposed contract change related to "rates of pay, rules or working conditions" and was thus a bargainable matter was clearly erroneous.<sup>9</sup> The Supreme Court, in turn, reversed the Court of Appeals and endorsed the finding of the District Court. The Supreme Court said (363 U. S. at 336):

Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment . . .

.. We cannot agree with the Court of Appeals that the union's effort to negotiate about the job security of its members "represents an attempt to usurp legitimate managerial prerogative in the exercise of business judgment with respect to the most economical and efficient conduct of its operations."

In describing the scope of collective bargaining required under the Railway Labor Act, the Court used language equally applicable to the bargaining obligation under the National Labor Relations Act. The Court said (363 U. S. at 338):

In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargain-

<sup>8</sup> The Railway Labor Act, 45 U.S.C. §152, First, provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning *rates of pay, rules, and working conditions*. . . ." (Emphasis supplied)

<sup>9</sup> *Chicago & N.W.R. Co. v. Order of Railroad Telegraphers*, 264 F.2d 254, 260 (C.A. 7).

able has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.

The dissent's attempt to distinguish the *Telegraphers* decision on the basis that railroads are "impressed with a public interest" is completely misplaced. There is no evidence that the obligation to bargain with respect to "wages, hours and other terms and conditions of employment" imposed by Section 8(d) of the National Labor Relations Act was intended to be more restrictive than the same obligation with respect to "rates of pay, rules and working conditions" under the Railway Labor Act. The evidence is to the contrary. The Supreme Court has said that "No distinction between public utilities and national manufacturing organizations has been drawn in the administration of the Federal Act. . . ." <sup>10</sup> The courts have also specifically held that the bargaining obligation under the National Labor Relations Act is broader in scope than that under the Railway Labor Act.<sup>11</sup> Moreover, *a priori* there would seem to be less need for imposing a broader obligation under the latter Act than under the former inasmuch as there are public agencies specifically created to protect the public interest in railroad cases. Finally, it is clear the "public interest" argument was not controlling in *Telegraphers* inasmuch as that argument was basic to the dissent which the majority in *Telegraphers* rejected.<sup>12</sup>

Further, in *Teamsters Union v. Oliver* 358 U. S. 283, decided before *Telegraphers*, the Supreme Court cited with ap-

<sup>10</sup> *Amalgamated Assn. of Street, Electric Railway Motor Coach Employees v. W.E.R.B.*, 340 U. S. 383, 391.

<sup>11</sup> *Inland Steel Company v. N.L.R.B.*, 170 F.2d 247 (C.A. 7) cert. denied, 336 U. S. 960. The substantial identity of the bargaining obligation under the two acts is manifested in *Elgin Railway Trainmen*, F.2d (C.A. 7), 50 LRRM 2148, decided May 4, 1962, where the Court held that pensions were a bargainable matter under the Railway Labor Act citing the *Inland Steel* decision, where a similar holding had been made under the National Labor Relations Act.

<sup>12</sup> See the dissenting opinion of Mr. Justice Whittaker, 362 U. S. 345-364.

proval the Board's decision in the *Timken Roller Bearing*<sup>13</sup> case with specific reference to the holding therein that subcontracting was a mandatory subject of bargaining. And in the *Warrior & Gulf* case,<sup>14</sup> decided after *Telegraphers*, the Supreme Court held that a union complaint against an employer's contracting out of work was subject to the contract grievance procedure, including arbitration, notwithstanding a provision in the contract which excluded from arbitration "matters which are strictly a function of management." The Court pointed out that "Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators."<sup>15</sup>

We conclude that the dissent is wrong in its reasoning, wrong in its interpretation of the *Telegraphers* case and wrong in its prediction of the dire results which may be expected to flow from the present decision. As the Supreme Court has noted, subcontracting or contracting out is a subject extensively dealt with in today's collective bargaining.<sup>16</sup> The present decision does not innovate; it merely recognizes the facts of life created by the customs and practices of employers and unions.<sup>17</sup> Contrary to our dissenting colleague, we are confident that those employers and unions who are bargaining in good faith will find it neither difficult nor inconsistent with sound business practices to include questions relating to subcontracting in their bargaining conferences.

### The Remedy

We have found that Respondent violated Section 8(a) (5) by unilaterally subcontracting its maintenance work without bargaining with the Charging Unions over its decision to do

<sup>13</sup> *Timken Roller Bearing Co.*, 70 NLRB 500, 518, reversed on other grounds, 161 F. 2d 949 (C.A. 6).

<sup>14</sup> *Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574.

<sup>15</sup> 363 U. S. at 584.

<sup>16</sup> See Lunden, *Subcontracting Clauses in Major Contracts*, 84 Monthly Labor Rev. 579-584, 715-723; Note, *Arbitration of Subcontracting Disputes: Management Discretion vs. Job Security*, 37 New York University Law Rev. 523.

<sup>17</sup> See *UAW, Local 391 v. Webster Electric Co.*, F.2d (C.A. 7), 49 LRRM 2592, decided February 7, 1962, where the court held that an employer violated its collective bargaining contract by subcontracting janitorial work and laying off its janitorial employees even though the contract contained no prohibition against subcontracting. The court implied such an agreement from the union shop clause in the contract is applicable to janitors.

so. We shall therefore order that Respondent cease and desist from unilaterally subcontracting unit work or otherwise making unilateral changes in their terms and conditions of employment without consulting their designated bargaining agent. As we stated in *Town and Country* "It would be an exercise in futility to attempt to remedy this type of violation if an employer's decision to subcontract were to stand. No genuine bargaining over a decision to terminate a phase of operations can be conducted where that decision has already been made and implemented." To adapt the remedy "to the situation which calls for redress."<sup>18</sup> we shall order the Respondent to restore the *status quo ante* by reinstituting its maintenance operation and fulfilling its statutory obligation to bargain.<sup>19</sup> Where that obligation has been satisfied after the resumption of bargaining, Respondent may, of course, lawfully subcontract its maintenance work.

As we further stated in *Town and Country*, "it would be equally futile to direct an employer to bargain with the exclusive bargaining representative of his employees over the termination of jobs which they no longer hold. Since the loss of employment stemmed directly from their employer's unlawful action in bypassing their bargaining agent, we believe that a meaningful bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to this unlawful action." Accordingly, we shall order that Respondent offer reinstatement to the employees engaged in the maintenance operation to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges. We shall also order that Respondent make them whole for any loss of earnings suffered as a result of Respondent's unlawful action in bypassing their bargaining agent and unilaterally subcontracting their jobs out of existence.<sup>20</sup> Backpay shall

<sup>18</sup> See *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 348.

<sup>19</sup> We do not believe that requirement imposes an undue or unfair burden on Respondent. The record shows that the maintenance operation is still being performed in much the same manner as it was prior to the subcontracting arrangement. Respondent has a continuing need for the services of maintenance employees; and, Respondent's subcontract is terminable at any time upon 60 days notice.

<sup>20</sup> See *West Boylston Manufacturing Company of Alabama*, 87 NLRB 808, 812-813. Compare *Piasecki Aircraft Corp. v. N.L.R.B.*, 280 F.2d 575, 591-592 (C.A. 3); *Editorial "El Imparcial" Inc., v. N.L.R.B.*, 278 F.2d 184, 187 (C.A. 1).



be based upon the earnings which they normally would receive from the date of this Supplemental Decision and Order to the date of Respondent's offer of reinstatement, less any net interim earnings, and shall be computed on a quarterly basis in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289; *N.L.R.B. v. Seven-up Bottling Company of Miami, Inc.*, 344 U. S. 344.<sup>21</sup>

### ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Fibreboard Paper Products Corporation, Emeryville, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO and United Steelworkers of America, AFL-CIO, as the exclusive bargaining representative of the Respondents employees in the appropriate maintenance and powerhouse unit with respect to wages, hours, and other terms and conditions of employment; and from unilaterally subcontracting unit work or otherwise unilaterally changing the wages, hours, and other terms and conditions of employment of unit employees without prior bargaining with the above-named Unions or any other union they may select as their exclusive bargaining representative.

(b) In any other manner, interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist the above-named Unions, or any other labor organization, to bargain collectively through representatives of

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<sup>21</sup> In the special circumstances of this case where the Board, upon reexamination of the relevant legal principles, has reversed its own prior determination that Respondent had not by its conduct violated the Act, we believe it would be wholly inequitable to hold Respondent liable for backpay from the date it initially terminated the employment of the individuals here involved. Accordingly, we find here the "unusual circumstances" to which reference was made in *A.P.W. Products, Inc.*, 137 NLRB No. 7, which would otherwise dictate more extended relief by way of backpay.



their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Reinstitute the maintenance operation previously performed by its employees represented by East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, and offer to those employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered by them in the manner set forth in the section above entitled "The Remedy."

(b) Bargain collectively with East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, as the exclusive bargaining representative of the Respondent's employees in the appropriate maintenance and powerhouse unit with respect to wages, hours, and other terms and conditions of employment.

(c) Preserve, and upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to determine the amount of backpay due and the rights of reinstatement under the terms of this Order.

(d) Post at its plant, in Emeryville, California, copies of the notice attached hereto marked "Appendix."<sup>22</sup> Copies of said notice, to be furnished by the Regional Director

<sup>22</sup> In the event that this Order is enforced by a decree of the United States Court of Appeals, the Notice shall be amended by substituting for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals Enforcing an Order."

for the Twentieth Region, shall, after being duly signed by the Respondent's representatives, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for the Twentieth Region, in writing, within 10 days from the date of this Supplemental Decision and Order, what steps have been taken to comply herewith.

Dated, Washington, D. C.

FRANK W. McCULLOCH, Chairman  
JOHN H. FANNING, Member  
National Labor Relations Board

(SEAL)

PHILIP RAY RODGERS, Member, dissenting:

I did not agree to the belated reconsideration by the Board of the previously issued and published decision in this case. I do not now agree to the reversal of that prior decision.

We are dealing here with a matter of basic import to the economy generally, and one of immediate concern to every person or group of persons engaged in private business in this country—the matter of how far and to what extent, if any, business management is free to make those economic decisions necessary to the improvement, or indeed the survival, of the business concern with which it is identified. More specifically, this case, like the recently issued *Town and Country*<sup>23</sup> case, poses the question of whether business management is free to subcontract work in the interest of the more efficient operation of its business.

In *Town and Country*, the majority has held, and here holds, in effect, that such decision is foreclosed to management; that such decision, if made at all, must be a negotiated decision, satisfactory to the union.<sup>24</sup> For any decision made solely by management and based solely on economic factors con-

<sup>23</sup> *Town & Country Manufacturing Company, Inc.*, 136 NLRB No. 111.

<sup>24</sup> Contrary to the majority's assertion, I am by no means suggesting that this is an area where the Board has "discretion" to exercise as they see fit. My view is that it is not within the province of the Board to compel management to bargain over one of its prerogatives.

stitutes a violation of this law, which violation must be remedied by this Agency's ordering the concern involved to reinstitute an uneconomic, outmoded or obsolete operation, and to remit back wages to all former employees "adversely affected" by such managerial action.<sup>25</sup> This is a drastic penalty.

To be sure, in describing what is required by business management in such circumstances as these, my colleagues have sought to soften the impact of their ruling by such statements as the following: "This obligation *in no way restrains an employer from . . . effectuating an economic decision to terminate a phase of his business operations . . . a prior discussion with the duly designated bargaining representative is all that the Act contemplates.*"<sup>26</sup> (Emphasis supplied)

If the foregoing social niceties represented all that is involved, one could not object. But the fact remains that by making such management decisions the subject of *mandatory* rather than *permissive* bargaining, my colleagues have, as they well know, thrust the entire question squarely into the arena of economic struggle and industrial turmoil where strikes, picket lines, charges, counter-charges, protracted litigation, and many other aspects of economic power possessed by a union are "protected" by this Board<sup>27</sup> and are, therefore,

<sup>25</sup> In *Town & Country, supra*, the majority ordered the employer to reinstitute its trucking operations, reemploy its former drivers, and to pay them back wages. In the instant case, the majority is ordering the employer to reestablish its maintenance department, reemploy the former employees of that department, and to pay them back wages.

<sup>26</sup> *Town and Country, supra*. We are not here considering the terms of an existing collective bargaining agreement. Enforcing the terms of an existing contract is a far different consideration from establishing, as here, the terms which may be demanded for inclusion in such an agreement under penalty of law.

<sup>27</sup> An illustrative, but by no means exhaustive picture of the extent to which this Board and the courts have gone in recognizing and protecting a union's right to strike and to engage in other forms of concerted activity to force an agreement on mandatory issues of bargaining may be gained from the following: *N.L.R.B. v. Mackay Radio & Telegraph Company*, 304 U. S. 333; *Auto Workers v. O'Brien*, 339 U. S. 454; *N.L.R.B. v. United States Cold Storage Corp.*, 203 F.2d 924 (C.A. 5); *N.L.R.B. v. Industrial Cotton Mills*, 208 F.2d 87 (C.A. 4); *Collins Baking Company v. N.L.R.B.*, 193 F.2d 483 (C.A. 5).

Indeed, even when bargaining has been carried forward to an impasse, this Board and the courts have further protected the right to strike by holding that, in such event, the strike itself breaks the impasse and thus requires further bargaining about the same subject matter. See *Boeing Airplane Co.*, 80 NLRB 447; *N.L.R.B. v. Reed & Prince Manufacturing Company*, 118 F.2d 874 (C.A. 1); *Texas Gas Corporation*, 136 NLRB No. 38.

legally available to a union to compel a complete abandonment by management of its proposal on pain of suffering irreparable damage to every aspect of its business. That such a power, in pursuit of mandatory bargaining objectives, is effectively employed by many modern unions is manifest in countless cases which come to public attention and to the attention of this tribunal day by day.<sup>28</sup>

Unlike my colleagues, I can find no authority for such a ruling as this in the statute which guides our labors. Reliance on *Telegraphers v. Chicago & N. W. R. Co.*, 362 U. S. 330 which turned on the construction of the Railway Labor Act and the Interstate Commerce Act, is, I believe, completely misplaced. By the statutes there involved, Congress sought to, and did, place certain monopolistic industries in a status of being "impressed with a public interest."<sup>29</sup> No such concepts

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<sup>28</sup> As I stated in my dissenting opinion in *Town & Country*, *supra*, "[w]hether to continue or terminate an operation is a prerogative of management not subject to collective bargaining. To hold, therefore, that an employer can be forced to bargain over the effect of a decision to terminate necessarily renders that prerogative meaningless. For, obviously, to require an employer to bargain over this aspect of his decision does not leave him free to make the decision; in such a situation he is left, for all practical purposes, in no better position than he would have been in had he been required to negotiate with the union the whole subject of termination."

Moreover, it is to be noted in this case that the so-called termination rights and termination benefits of the affected employees were fully covered by an existing collective bargaining agreement of the parties and were not therefore subject to further mandatory bargaining. It is also worthy of note that the employer herein assured the union of its intention to abide by the terms of that agreement.

<sup>29</sup> "Indicative of the broad and permeating degree of governmental regulations and control which Congress imposed upon the railroad industry in the public interest by the Interstate Commerce Act and the Railway Labor Act, are the following excerpts from the Supreme Court's opinion in the *Telegrapher's* case: 'In pertinent part it [the Interstate Commerce Act] provides: 'It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation, subject to the provisions of this Act . . . to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers. . . .'; 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind'; 'For the fair and firm effectuation of these policies, Congress has provided that issues respecting the propriety of [abandonment, combinations, and consolidations] all railroads be determined by a public regulatory body, the Interstate Commerce Commission'; 'Congress, in the Interstate Commerce Act, has expressly required that before approving such . . . the Interstate Commerce Commission 'shall require a fair

were embodied in, or even seriously suggested for embodiment in, either the Wagner Act or the Taft-Hartley Act. Nor, in my opinion, does this Board have the power, as a matter of policy, to place such a "public interest" imprimatur on every business enterprise in the United States, without the prior approval of Congress and the courts.<sup>30</sup>

Nor do I agree that the Supreme Court's decision in *Steelworkers v. Warrior & Gulf Co.*, 365 U. S. 574, aids the majority's cause. The Court in that case was concerned with whether by an arbitration clause in an existing contract the Company had agreed to arbitrate the subject of contracting out. It is one thing to say that an Employer may be compelled to arbitrate where he had so bound himself by agreement; however, it is an entirely different thing to hold that he can be compelled to negotiate on that subject for inclusion in the agreement. Likewise I cannot read into the Supreme Court's passing reference in *Teamsters Union v. Oliver*, 358 U. S. 283, to the *Timken Roller Bearing* case any conclusion that the Court was thereby adopting the view that subcontracting was a mandatory subject of bargaining.

If this ruling of the majority stands, it is difficult to foresee any economic action which management will be free to take of its own volition and in its own vital interest (whether it be the discontinuance of an unprofitable line, the closing of an unnecessary facility, or the abandonment of an outmoded procedure) which would not be the subject of mandatory bargaining.

In the final analysis, the subjecting of such management decisions as this to the ambit of the Board's processes, and particularly to the mandatory bargaining requirements, simply

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and equitable arrangement to protect the interest of the railroad employees affected"; "The Interstate Commerce Commission has power to include conditions for the protection of displaced persons in deciding what the public convenience and necessity may require."

<sup>30</sup> Moreover, it has been judicially recognized that managerial decisions such as that in issue here are not mandatory subjects of bargaining under our Act. See *Jays Foods, Inc. v. N.L.R.B.*, 292 F.2d 317 (C.A. 7); *N.L.R.B. v. Rapid Bindery, Inc.*, 293 F.2d 170, 176 (C.A. 2). See also *N.L.R.B. v. New Madrid Manufacturing Company*, 215 F.2d 908, 914 (C.A. 8); *N.L.R.B. v. Lassing*, 284 F.2d 781, 783 (C.A. 6); *N.L.R.B. v. Houston Chronicle Pub. Co.*, 211 F.2d 848, 851 (C.A. 5); *N.L.R.B. v. R. C. Mahon Co.*, 269 F.2d 44, 47 (C.A. 6); *N.L.R.B. v. Adkins Transfer Co.* 226 F.2d 324, 327-328 (C.A. 6); and cases annotated at 152 A.L.R. 149.



means that short of complete union agreement, any action taken by management must hereafter be taken at its peril.<sup>31</sup>

The time involved in extensive negotiations and in protracted litigation before the Board, together with the numerous technical vagaries, practical uncertainties, and changing concepts which abound in the area of so-called "good faith bargaining," make it impossible for management to know when, if, or ever, any action on its part would be clearly permissible. These factors, together with the crushing, burdensome remedy, which this Agency will retroactively impose upon a given enterprise, should the National Labor Relations Board determine that the action of management was (for whatever reason) improperly taken, will serve effectively to retard and stifle sound and necessary management decisions. Such a result, in my opinion, is compatible neither with the law, nor with sound business practice, nor with a so-called free and competitive economy.

Accordingly, I would dismiss the complaint.

Dated, Washington, D. C.

PHILIP RAY RODGERS, Member  
National Labor Relations Board

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<sup>31</sup> The following cases demonstrate that management acts at its peril in a bargaining context notwithstanding the existence of an impasse, a strike, or the absence of bad faith in the circumstances: *Boeing Airplane Co., supra*, holding it is incumbent upon the respondent to explore the changed situation arising from strike action by resuming negotiations with the union. Failure to do so resulted in the finding of bad faith bargaining. To the same effect, see *N.L.R.B. v. United States Cold Storage Corp.*, 203 F.2d 924 (C.A. 5). *Tom Thumb Stores, Inc.*, 123 NLRB 833, 835, (holding that employer relies on contention of inappropriate unit at his peril); *Cone Brothers v. N.L.R.B.*, 235 F.2d 37, 41 (C.A. 5) (unlawful refusal to bargain despite employer's genuine belief that election and certification were invalid); *Art Metals Construction Company*, 110 F.2d 148, 150 (C.A. 2) (in finding refusal to bargain, Court stated employer questions majority status at his peril).

**APPENDIX****Notice to All Employees****PURSUANT TO  
A SUPPLEMENTAL DECISION AND ORDER**

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

**WE WILL NOT** refuse to bargain collectively with **EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO** and **UNITED STEELWORKERS OF AMERICA, AFL-CIO** as the exclusive representative of our maintenance and powerhouse employees in the appropriate unit.

**WE WILL NOT** unilaterally subcontract unit work or otherwise unilaterally make changes in the wages, hours, and other terms and conditions of employment for the employees in the appropriate unit without prior bargaining with **EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, UNITED STEELWORKERS OF AMERICA, AFL-CIO**, or any other union which they may select as their exclusive bargaining representative.

**WE WILL NOT** in any other manner interfere with, restrain or coerce our employees in the exercise of their rights to self-organization, to form labor organizations, to join or assist **EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO**, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

**WE WILL** reinstitute our maintenance operations previously performed by our employees represented by



**EAST BAY UNION OF MACHINISTS, LOCAL 1304 of  
UNITED STEELWORKERS OF AMERICA, AFL-CIO.**

**WE WILL** bargain collectively with **EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS OF AMERICA, AFL-CIO, and UNITED STEELWORKERS OF AMERICA, AFL-CIO**, as the exclusive bargaining representative of our employees in the appropriate maintenance and powerhouse unit with respect to wages, hours, and other terms and conditions of employment.

**WE WILL** offer to those employees discharged as a result of the subcontracting of the maintenance operations immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered by them as a result of our bypassing the above-named exclusive bargaining representative and unilaterally subcontracting our maintenance operation.

**FIBREBOARD PAPER PRODUCTS CORPORATION**  
(Employer).

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

**NOTE:** We will notify any of the above employees presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act after discharge from the Armed Forces.

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This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 830 Market Street, Room 703, San Francisco 2, California (Tel. No. YUkon 6-3500 Ext. 3191), if they have any questions concerning this Notice or compliance with its provisions.

**UNITED STATES OF AMERICA****Before the National Labor Relations Board****[Caption Omitted]****DECISION AND ORDER**

On November 27, 1959, Trial Examiner Howard Myers issued his Intermediate Report in the above-entitled proceeding finding that the allegations of the complaint were not supported by substantial evidence and recommending that the complaint be dismissed in its entirety as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent, the Union, and the General Counsel filed exceptions to the Intermediate Report and briefs in support thereof.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the parties' exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following modifications and additions.

The record in this case shows that Respondent had bargained with United Steelworkers of America, AFL-CIO, the charging party in this case, for a unit of some 50 maintenance and powerhouse employees under a series of collective bargaining contracts since 1937. The last of these contracts expired on July 31, 1959. Between 1954 and 1956 the Respondent had under consideration the feasibility of contracting out its maintenance work as a measure of effecting plant economies. The study was renewed in June, 1959. As a result of the renewed study, Respondent reached the decision on July 27, 1959 to effectuate this plan, which, it was estimated, would save the Respondent \$225,000 annually in addition to a substantial reduction in manpower. Automatic renewal of the existing contract with the Steelworkers had been forestalled by the Union's letter of May 26, requesting substantial modifications in the existing contract. As soon as Respondent had made its decision on subcontracting, R. C. Thumann, its director of industrial relations, contacted W. F. Stumpf, the international representative of the Steelworkers, and informed him that negotiations for a new contract covering the maintenance em-

employees would be pointless as the change in Respondent's method of operations would become effective on July 31, upon expiration of the existing contract. It is undisputed that the Union had not previously been informed of the Respondent's intention with regard to contracting out the maintenance work. According to the testimony of Thumann, which was credited by the Trial Examiner, on July 27 and again on July 30, Respondent informed the Steelworkers' representatives that Respondent was prepared to give termination pay to the terminated employees as well as additional allowances and benefits. No objections to these proposals were raised by the Steelworkers.<sup>1</sup>

The Trial Examiner found that the Respondent's motive in contracting out its maintenance work was economic rather than discriminatory. Accordingly, he concluded that the maintenance employees were validly terminated when the Respondent, in the exercise of its business judgment, decided to contract out the work theretofore performed by the Respondent with its own employees. We agree with the Trial Examiner that the evidence fails to support the allegation of the complaint that the Respondent's decision was motivated by discriminatory reasons.

In his exceptions to the Intermediate Report, however, the General Counsel contends that the Trial Examiner did not pass upon an issue of primary importance in this case. It is the position of the General Counsel that the Respondent was under a statutory duty to bargain with the Steelworkers about its decision to contract out the maintenance work. The General Counsel relies upon language from the *Shamrock Dairy* case, 124 NLRB 494, 498, that the duty to bargain "... includes the obligation to notify the collective bargaining representatives and to give such representative a chance to negotiate with respect to a contemplated change concerning the tenure of the employees and their conditions of employ-

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<sup>1</sup> Since the Respondent was willing to discuss the termination benefits to which the affected employees were entitled, such as termination pay and pro-rata vacation pay, this case is to be distinguished from *Brown-Dunkin, Inc.*, 125 NLRB No. 128, and *Brown Truck and Trailer Manufacturing Company, Inc.*, 106 NLRB 999, in which the 8(a)(5) violations were predicated upon a refusal to bargain about certain incidents of termination.

ment. . . ." Considered, however, in the context<sup>2</sup> of the supporting citation of the *Brown Truck* case, *supra*, this language does not support the broad proposition, urged upon us by the General Counsel, that a management decision to cease one phase of its operations solely for economic reasons is in and of itself a mandatory subject of bargaining. Indeed, not only is this broad proposition without supporting precedent, but it is in fact contrary to existing precedent. For, as the Board has held, the establishment by the Board of an appropriate bargaining unit does not preclude an employer acting in good faith from making changes in his business structure, such as entering into subcontracting arrangements, without first consulting the representative of the affected employees.<sup>3</sup>

Moreover, considering the question *de novo*, we conclude that the General Counsel's position is not supported by the statutory language or purpose. The statutory obligation imposed upon employers by Section 8(a)(5) is unquestionably broad, and includes the obligation to bargain not only concerning matters affecting employees while they are employed, but also, concerning matters as they affect termination and post-termination rights and obligations. None of the obligations heretofore imposed with respect to this latter category concern, however, the question whether, as here, a termination will occur; all, rather presuppose that terminations will occur, and are concerned solely with such matters as selection for termination among present employees, and benefits flowing from present employment which employees may be entitled to receive at the time of or following the termination of employment. These matters, therefore, although they look to the future, nevertheless involve matters presently affecting employees within an existing bargaining unit; for that reason they fall within the statutory language as "conditions of employment."<sup>4</sup>

<sup>2</sup> See *Armour & Co. v. Wantock*, 323 U. S. 126, 133, where the Court cautioned that "words of our opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading."

<sup>3</sup> *Mahoning Mining Company*, 61 NLRB 792, 803; See also, *Walter Holm & Company*, 87 NLRB 1169, 1172.

<sup>4</sup> Member Rodgers concurs in the dismissal of the complaint herein. However, he does not subscribe to that portion of the opinion which asserts that the Respondent was under an obligation to bargain with the Union about the so-called termination rights and termination benefits of the affected employees. These matters were fully covered by the

The obligation which the General Counsel would impose is, however, of an entirely different nature. For it is not concerned with the conditions of employment of employees within an existing bargaining unit; it involves, rather, the question whether the employment relationship shall exist. Although the determination of that question obviously affects employees, that determination does not relate to a condition of employment, but to a precondition necessary to the establishment and continuance of the relationship from which conditions of employment arise. Moreover, although the statutory language is broad, we do not believe it is so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort. Under all the circumstances, therefore, we conclude that Section 8(a) (5) of the Act does not obligate the Respondent to bargain with the Steelworkers concerning its economically motivated decision to sub-contract its maintenance operations.

We do not agree with our dissenting colleague that the *Timken*, *Shamrock*, and *Railroad Telegraphers* cases<sup>5</sup> compel a contrary conclusion. In each of those cases, the union continued and would continue to be the representative of employees in the pre-existing unit, and the decisions which the employers might make, in *Timken* and *Shamrock* with respect to subcontracting and in *Railroad Telegraphers* with respect to abolition of positions, had or might have an impact on the conditions of employment of employees remaining in the unit. For that reason the employees' representative was entitled to bargain with respect to such decisions. Here, however, as set forth above, no employees remained in the unit to be represented by the Union, and thus there necessarily could be no impact on the employment conditions of employees remaining in the unit. Those cases, therefore, do not support the proposition which our colleague urges—that a union which will not represent any of the employer's employees is entitled

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existing collective bargaining agreement of the parties and were not therefore subject to further mandatory bargaining. Accordingly, he finds it unnecessary to pass upon the applicability of the *Timken*, *Shamrock*, and *Railroad Telegraphers* cases to the facts of this case.

<sup>5</sup> *The Timken Roller Bearing Company*, 70 NLRB 500; *Shamrock Dairy, Inc.*, 124 NLRB 494; *The Order of Railroad Telegraphers, et al. v. Chicago and North Western Railroad Co.*, 362 U. S. 330.

to compel the employer to bargain about matters which will have an impact only when it ceases to be a representative.<sup>6</sup>

We also agree with the Trial Examiner for the reasons stated in the Intermediate Report that the Respondent did not violate Section 8(d) of the Act by failing to abide by the notice provisions of that Section when it decided to contract out the maintenance work upon expiration of the existing contract.

#### ORDER

IT IS HEREBY ORDERED that the complaint herein be and it hereby is, dismissed.

Dated, Washington, D. C., March 27, 1961

PHILIP RAY RODGERS,  
Member

BOYD LEEDOM,  
Member

JOSEPH ALTON JENKINS,  
Member

(SEAL)

National Labor Relations Board

JOHN H. FANNING, MEMBER, dissenting in part and concurring in part:

The basic facts in this case are substantially undisputed. The Respondent, after being notified of the Union's contract demands, revived its dormant plan to subcontract out the plant maintenance work, ostensibly as an economy measure. The Respondent notified the Union of this for the first time on July 27, 1959, 4 days before the expiration of the contract on July 31, 1959. The subcontracting arrangement was to take effect at the expiration of the contract. The Union protested this change, but the Respondent refused to discuss its decision and unilaterally put the subcontracting operation into effect, discharging the union-member employees previously doing the maintenance work. Even accepting, as I do, that the decision was made for a valid economic reason, I conclude, contrary to my colleagues, that the conduct of the Employer in this case violates a basic requirement of the Act. Simply stated,

<sup>6</sup> Insofar as language in the above cases, taken out of context, may seem to lend support to the position of our dissenting colleague, see footnote 2, *supra*.



the issue here is whether an employer, absent any discriminatory motivation, violates Section 8(a)(5) of the Act when he refuses to discuss with the union his decision to subcontract the work previously done by union-member employees and unilaterally subcontracts that work.

Section 8(d) requires an employer to bargain in good faith "... with respect to wages, hours, and other terms and conditions of employment, for the negotiating of an agreement, or any question arising thereunder, ..." If subcontracting is such a subject, then the Respondent in this case violated the Act, even if the decision to subcontract was otherwise lawfully motivated.

In the *Timken Roller Bearing* case<sup>7</sup> the Employer refused to bargain about his intention to subcontract work in the future. The Board, in agreement with the findings and reasoning of the Trial Examiner, decided that this conduct constituted a refusal to bargain. In so doing the Board specifically adopted the Trial Examiner's conclusion that "... the Respondent's system of subcontracting work may vitally affect its employees by progressively undermining their tenure of employment in removing or withdrawing more and more work and hence more and more jobs from the unit."<sup>8</sup> This reasoning applies with considerably more vigor where, as in the instant case, the entire complement of workers were rendered jobless in a single transaction. The *Timken* case is indistinguishable from the instant case on the subcontracting issue.

More recent Board cases may be cited to the same effect. Thus in the *Shamrock Dairy* case,<sup>9</sup> the Employer, without notice to the Union, executed individual employment contracts with its employee-drivers for the purpose of establishing an independent contractor system of distributing its products. A Board majority held that such unilateral adoption of the new system of distribution constituted a violation of Section 8(a)(5) and (1) of the Act.

"Members Jenkins and Fanning agree with the Chairman for the reasons stated hereinafter that the Respondent violated Section 8(a)(5) and (1) by failing to bargain

<sup>7</sup> The *Timken Roller Bearing Company*, 70 NLRB 500, enforcement denied on other grounds, 161 F.2d 947.

<sup>8</sup> The *Timken Roller Bearing Company*, *supra*, at 518.

<sup>9</sup> *Shamrock Dairy, Inc.*, 124 NLRB 494.



with the Union as to whether the so-called independent contractor system of distribution should be adopted.”<sup>10</sup>

While the Remedy section of that case is less clear, the Order of the Board was unambiguous in that it ordered the employer to bargain about the adoption of the independent contractor system of distribution.

A careful reading of the *Shamrock* case reveals that the portion of that case cited by the majority in the instant case is not the holding, but merely one of the *reasons* for the holding, as the above quotation from the *Shamrock* case indicates.

Whatever the effect of the foregoing decisions, it is clear that the opinion of the Supreme Court of the United States in the *Railroad Telegraphers* case<sup>11</sup> controls the disposition of the instant case. That case dealt with the right of the Union to demand bargaining on its proposed contract provision that “No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization.”<sup>12</sup> The Railroad sought an injunction to prevent any strike by the Union in support of that demand. The Railroad argued that this was not a “labor dispute” within the meaning of the Norris-LaGuardia Act and, accordingly, that the anticipated strike was enjoinable. The Railroad further contended that, regardless of the Norris-LaGuardia Act, the strike was unlawful and hence enjoinable.

In that portion of the decision which applies directly to the instant case the Supreme Court held that the Union’s proposal was not unlawful: “Here, far from violating the Railway Labor Act, the Union’s effort to negotiate its controversy with the railroad was in obedience to the [Railway Labor] Act’s command that employees as well as railroads exert every reasonable effort to settle all disputes concerning ‘rates of pay, rules, and working conditions’ 45 U.S.C. 82, 1st”.<sup>13</sup>

Section 2, First of the Railway Labor Act is substantially identical in its pertinent provisions to Section 8(d) of the National Labor Relations Act, *supra*, and, like Section 8(d), it imposes the affirmative duty to bargain.<sup>14</sup>

<sup>10</sup> *Shamrock Dairy, Inc.*, *supra*, at 497, 498.

<sup>11</sup> *Telegraphers v. Chicago and N.W.R. Co.*, 362 U.S. 330.

<sup>12</sup> *Telegraphers v. Chicago and N.W.R. Co.*, *supra* at 332.

<sup>13</sup> *Telegraphers v. Chicago and N.W.R. Co.*, *supra* at 339.

<sup>14</sup> *Virginia Railway Co., v. System Federation No. 40*, 300 U. S.

Since the scope of the duty to bargain is substantially the same under both the NLRA and RLA,<sup>15</sup> the *Railroad Telegraphers* case is directly applicable to the instant case. Since the Union's demand to bargain about job abolition or discontinuance was a proper subject of bargaining under the RLA, it necessarily follows that the Union's demand to bargain about the abolition of jobs under a proposed subcontracting arrangement in the instant case is also a proper subject of bargaining.

My position in the instant case is simply a restatement of what is already the law by virtue of the Supreme Court's decision in the *Railway Telegraphers* case.<sup>16</sup> In this connection, it may be noted that an attempt was made in the 2nd Session of the 86th Congress to reverse this interpretation of the existing law.<sup>17</sup> This attempt having failed in Congress, I do not believe it should succeed in this agency.

To hold, as the majority does in the instant case, that the Employer is not obliged to bargain about its decision to subcontract, is contrary not only to the Act and the Board's own precedents but the clear pronouncement of the Supreme Court of the United States.<sup>18</sup> As a result of the majority's decision,

<sup>15</sup> Indeed the term "other terms and conditions of employment" in the NLRA has been held to be more inclusive than the term "working conditions" in the RLA. *Inland Steel Company v. N.L.R.B.*, 170 F.2d 247, cert. den. 336 U. S. 960.

<sup>16</sup> Although the *Railroad Telegraphers* case in the Supreme Court opinion upon which I primarily rely in resolving the instant case, the Supreme Court has had occasion in the past to shed some light on its thinking with respect to mandatory subjects of bargaining when it cited, with approval, *Timken Roller Bearing Co.*, *supra*, in the following context.

"It is not necessary to set precise outside limits to the subject matter properly included within the scope of mandatory collective bargaining. Cf. *Labor Board v. Borg-Warner Corp.*, 356 U. S. 342, to hold, as we do, that the obligation under Section 8(d) on the carrier and their employees to bargain collectively with respect to wages, hours, and other terms and conditions of employment and to embody their understanding in a written contract incorporated in any agreement reached, found an expression in the subject matter of Article XXXII [wages]. See *Timken Roller Bearing Co.*, 70 NLRB 500, 518 reversed on other grounds, 161 F.2d 947. And certainly bargaining on this subject through their representatives was a right of the employees protected by §7 of the Act." *Teamsters Union v. Oliver*, 358 U. S. 283, 294, 5.

<sup>17</sup> S. 3548, 86th Cong., 2nd Sess.

<sup>18</sup> With respect to the majority's contention that my reliance on existing precedent is "taken out of context," such a contention is hardly an answer to specific holdings of Board and court decisions. The cases cited, of course, are available for the consideration of any interested persons.

employers by the simple expedient of unilaterally subcontracting work may abolish every job in a collective bargaining unit and thereby eliminate union representation.

In my opinion, Section 8(d) under existing Board and Supreme Court decisions imposes on an employer the duty to bargain about its decision to subcontract work performed by employees represented in a collective bargaining unit.<sup>19</sup> Clearly, this duty to bargain is not an order restraining the employer from subcontracting such work. The duty to bargain does not include an obligation to yield. Had the employer bargained about its decision to subcontract the maintenance work in the instant case, it is entirely possible that the parties could have arrived at a solution to the problem short of subcontracting the entire maintenance operation. It seems to me that this possibility is the goal of sound collective bargaining, which the Act is designed to foster and encourage.

I agree with the majority that the Respondent did not violate Section 8(d) with respect to the notice provisions of that Section.

Dated, Washington, D. C., March 27, 1961

JOHN H. FANNING, Member  
National Labor Relations Board

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<sup>19</sup> The majority asserts that the *Timken*, *Shamrock*, and *Railroad Telegraphers* cases are not inconsistent with their decision here. They would distinguish the instant case from the cited cases on the ground that after the unfair labor practice occurred "no employees remained in the unit to be represented by the Union." Presumably, the majority would find a violation of Section 8(a)(5) if the Respondent had subcontracted half of its maintenance work without bargaining. This is to say that discharging some employees in a unit without bargaining is unlawful, but discharging all of them is not. The inconsistency of this approach is apparent, and promises a sound basis for future confusion in an already difficult area of the law.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**Division of Trial Examiners  
Branch Office  
San Francisco, California**

**FIBREBOARD PAPER PRODUCTS CORPORATION<sup>1</sup>  
and  
EAST BAY UNION OF MACHINISTS, LOCAL 1304,  
UNITED STEELWORKERS OF AMERICA, AFL-CIO  
and  
UNITED STEELWORKERS OF AMERICA, AFL-CIO**

**INTERMEDIATE REPORT AND RECOMMENDED ORDER**

**Statement of the Case**

Upon a joint charge duly filed on July 31, 1959, by East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, herein conjointly called the Steelworkers, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel<sup>2</sup> and the Board, through the Regional Director for the Twentieth Region (San Francisco, California), issued a complaint, dated September 2, 1959, alleging that Fibreboard Paper Products Corporation, herein called Respondent, had, and was, engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(1)(3) and (5) and Section 2(5) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act.

Copies of the charge and complaint, together with notice of hearing thereon, were duly served upon Respondent and upon the Steelworkers.

Specifically, the complaint, as amended at the hearing, alleged that, in violation of Section 8(a)(1), (3) and (5) of the Act, Respondent on about July 27, 1959, entered into an oral understanding, to take effect on August 1, 1959, with

<sup>1</sup> Erroneously referred to in the formal papers as Fibreboard Paper Products Corp.

<sup>2</sup> This term specifically includes counsel for the General Counsel appearing at the hearing.

Fluor Maintenance, Incorporated, herein called Fluor, whereby Fluor, acting as an independent contractor, was to perform all Respondent's Emeryville plant maintenance work, including all work previously performed by Respondent's employees who were then represented, for the purpose of collective bargaining, by the Steelworkers; (2) on or about July 30, 1959, notified the Steelworkers that the then current collective bargaining contract between it and the Steelworkers would terminate the following day because Respondent would no longer have any employees in the unit covered by said contract; (3) refused to bargain with the Steelworkers regarding termination pay; and (4) on July 30, 1959, terminated all employees in the unit covered by said contract in accordance with its aforementioned understanding with Fluor. The complaint, as amended, further alleged that Respondent failed to fulfill its statutory duty to bargain collectively with the Steelworkers within the meaning of Section 8(d) of the Act.

On September 10, 1959, Respondent duly filed an answer, which was amended at the hearing, denying the commission of the unfair labor practices alleged.

Pursuant to due notice, a hearing was held on September 21 and 22, 1959, at San Francisco, California, before the undersigned, the duly designated Trial Examiner. All parties were represented by counsel who participated in the hearing. Full opportunity was afforded counsel to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally on the record at the conclusion of the taking of the evidence, and to file briefs on or before October 27, 1959.<sup>3</sup> Briefs have been received from Respondent's counsel and from counsel for the Steelworkers which have been carefully considered. After the close of the hearing, counsel for the Steelworkers and Respondent's counsel entered into a written stipulation to correct certain errors appearing in the stenographic transcript of the hearing. The stipulation is hereby approved, and the corrections are hereby deemed made. The stipulation is received in evidence as Trial Examiner's Exhibit 1.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

<sup>3</sup> At the request of counsel for the Steelworkers the time to file briefs was extended to November 9, 1959.

## **I. Findings of Fact**

Respondent, a Delaware corporation, operating 20 plants in the States of California, Oregon, Nevada, and Colorado, is engaged in the manufacture, sale, and distribution of paint, industrial insulation, roofing materials, floor covering materials, and related products. During the 12-month period immediately preceding the issuance of the complaint herein, Respondent sold and shipped from its Emeryville, California, plant, the employees of which are the only ones involved in this proceeding, to customers located outside of the State of California, finished products valued in excess of \$1,000,000. During the same period, the Emeryville plant's out-of-state purchases of raw materials exceeded \$1,000,000.

Upon the above admitted facts, the undersigned finds that Respondent at all times material herein was, and now is, engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction over this proceeding.

## **II. The labor organizations involved**

East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, and United Steelworkers of America, AFL-CIO, are labor organizations admitting to membership employees of Respondent.

## **III. The alleged unfair labor practices**

### **A. The pertinent facts**

For more than a score of years the Respondent and/or its predecessors have had collective bargaining contracts with the Steelworkers and/or its predecessors.

The contract in issue in this proceeding, dated September 24, 1958, effective as of August 1, 1958, expired by its terms, on July 31, 1959,<sup>4</sup> covered all Respondent's maintenance employees.<sup>5</sup>

The pertinent provisions of said contract reads as follows:

<sup>4</sup> Unless otherwise indicated, all dates hereinafter mentioned refer to 1959.

<sup>5</sup> These 50 or so employees are described in the record as "maintenance, mechanics and machinists, their helpers, working foremen, and firemen and engineers employed in the powerhouse, and the storekeeper in the central supply and store room."



This Agreement shall continue in full force and effect to and including July 31, 1959, and shall be considered renewed from year to year thereafter between the respective parties unless either party hereto shall give written notice to the other of its desire to change, modify, or cancel the same at least sixty (60) days prior to expiration.

Within fifteen (15) days after notice of reopening is given, the opening party shall submit a complete and full list of all proposed modifications. All other sections shall remain in full force and effect. Negotiations shall commence no later than forty-five (45) days prior to the anniversary date of the Agreement unless otherwise mutually changed.

Under date of May 26, the Steelworkers wrote Respondent as follows:

Pursuant to the provisions of the Labor Management Relations Act, 1947, you are hereby notified that the Union desires to modify as of August 1, 1959 the collective bargaining contract dated July 31, 1958, now in effect between the Company and the Union.

The Union offers to meet with the Company at such early time and suitable place as may be mutually convenient, for the purpose of negotiating a new contract.

Under date of June 2, R. C. Thumann, for the past 10 years Respondent's director of industrial relations and as such, was Respondent's chief negotiator with the unions representing its employees, replied to the aforesaid letter in the following manner:

This will acknowledge your letter of May 26, 1959, requesting a meeting to discuss modifications of the current Agreement between the Emeryville Plant of Fibre-board Paper Products Corporation and the United Steelworkers of America on behalf of the East Bay Union of Machinists, Local 1304.

We will contact you at a later date regarding a meeting for this purpose.

Under date of June 15, the Steelworkers wrote Respondent requesting a meeting to discuss the proposals enclosed in said letter. The proposals read as follows:



### **Wage Scales**

SECTION I—We would like to arrive at a basis to eliminate the unfair wage discrepancy between the machinist and the other crafts in the plant.

### **Seniority**

SECTION IV—Paragraph b—Change ninety (90) days to thirty (30) days.

### **Hours of Work and Overtime**

SECTION V—We request a 35 hour week—schedule of shifts to be worked out.

### **Holidays**

SECTION XII—1. Add, one additional paid Holiday.  
2. Delete worked the day before and the day after, for qualifying.

### **Night Differentials**

SECTION XIII—(a) Change to ten (10) percent, and fifteen (15) percent.

### **Vacations**

SECTION XV—We request three weeks vacation after five years of service, and four weeks vacation after fifteen years of service.

### **Welfare Plan**

SECTION XVII—The plant to pay full cost of Health and Welfare. The Plant also to extend the coverage to retired employees under the pension plan.

### **Adjustment of Complaints**

SECTION XXI—Add new section between (a) and (b) as follows:

Such meeting between an executive of the Plant and a representative of the Machinist Union no later than five working days after referral to the above representatives

of the parties. Failure of either party to be available shall constitute concession of the grievance to the other party. The time limit may be extended by mutual agreement.

#### New

We request five cents per hour to be placed into a fund to provide for supplementary unemployment benefits for employees laid off in a reduction in force. To provide at least sixty-five percent of the employees normal weekly wage, including unemployment benefits.

Qualifications to be those of the State Department of Employment.

On June 26, Lloyd Ferber, for more than seven years the business representative of Local 1304, telephoned Thumann and during the conversation requested a bargaining meeting and Thumann replied that he would telephone him during the week of July 12, to arrange such a meeting.

During the week of July 12, Ferber again telephoned Thumann but did not speak to him because Thumann was not in his office. Ferber left word with Thumann's secretary to have Thumann call him. Thumann did not return the call but instead had his secretary telephone Ferber and tell Ferber that he would endeavor to call Ferber before the end of that week to fix a time for a meeting.

On the morning of July 27, Thumann was informed that Respondent had decided to "contract out" the work which then was being performed by the men covered by the Steelworkers' contract. He immediately telephoned William F. Stumpf, a representative of the Steelworkers (the International) and stated that he desired to meet with him and Ferber as soon as possible. Because of other union business Stumpf and Ferber could not meet with Thumann until late that afternoon.

Stumpf, Ferber and Thumann met at about 5:30 that afternoon, July 27. The discussion was opened by Ferber remarking that Thumann would receive, in the forepart of the week, a communication from the Central Labor Council informing him that Ferber had "asked for strike sanction against the plant." Thereupon, Thumann handed to Ferber and to Stumpf copies of letters, dated July 27, reading as follows:

Mr. Wm. F. Stumpf, Representative  
 UNITED STEELWORKERS OF AMERICA  
 610 Sixteenth Street—Rooms 219-220  
 Oakland 12, California

**SUBJECT: EMERYVILLE PLANT AGREEMENT**

Under date of May 26, 1959, Mr. Stumpf, you notified us of your desire to modify our collective bargaining agreement with your Union dated September 24, 1958, relative to maintenance employees at our Emeryville plant, and of your desire to meet for the purpose of negotiating a new contract to be effective August 1, 1959. Under date of June 15, 1959, you forwarded your contract proposals.

For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.

In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

/s/ R. C. Thumann  
 Director of Industrial Relations<sup>6</sup>

After Stumpf and Ferber had read the letters, considerable discussion then ensued regarding Respondent's legal right to enter into a contract with a third party to do the work which had been done by members of Local 1304. When mention was made that a picket line would be established at the plant if Respondent entered into such a contract, Thumann stated that it would be directed against the contractor in order to force him to hire Local 1304 members. Thumann also stated that Respondent not only would give each person laid off, because of the termination of his employment with Respondent, all the termination pay and other monetary and similar benefits due under the collective bargaining agreement, but would also, even though the agreement did not so provide, grant them vacation pay on a pro rata basis. When Thumann was asked the name of the contractor who was to do the main-

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<sup>6</sup> The letter handed to Ferber was addressed to Ferber and his name appears in the first paragraph thereof. The May 26 letter mentioned in the above quoted letter was signed by both Ferber and Stumpf.

tenance work, he replied that Respondent had under consideration two contractors and that as soon as Respondent decided between them he would immediately advise Ferber. The meeting concluded with the understanding that the parties would meet again the following Thursday, July 30.

The next day, July 28, Thumann telephoned Ferber and said that the contract had been let to Fluor. After some further conversation relative to the establishment of a picket line, Thumann agreed to meet with Ferber and the Steelworkers' negotiating committee on Thursday afternoon, July 30.

The following letter, dated July 29, was received by Respondent on July 30:

Fibreboard Paper Products Corporation  
P. O. Box 4317  
Oakland, California  
Attention: Mr. R. C. Thumann,  
Director of Industrial Relations

Gentlemen: Re: Subject: Emeryville Plant Agreement  
Reference is made to your letter of July 27, 1959.

We interpret your letter to mean that you are attempting to cancel your present agreement with us. If that is your intention, you are too late. We direct you to the provision of the agreement which requires that you should have given us at least sixty (60) days notice of cancellation prior to the July 31, 1959 expiration date.

In the absence of such notice, the contract has been automatically renewed for another year, subject, of course, to your obligation to meet with us at once to discuss the proposed modifications which we sent you, following our notice of May 26 for modifications of the existing agreement.

We trust that you will not lock out the employees covered by our agreement, and that you will not consummate the plan outlined in your letter of July 27th. We call upon you to meet with us at once.

Very truly yours,

UNITED STEELWORKERS OF AMERICA  
AFL-CIO

By Wm. F. Stumpf, Representative

By Lloyd Ferber, Business Rep.

Local 1304

On the afternoon of July 30, Thumann and four other Respondent officials met with Stumpf, Ferber, the employees' negotiating committees, and others. At the opening of the meeting, Thumann handed copies of the following letter signed by Thumann and dated July 30, to both Stumpf and Ferber:

Messrs. Wm. F. Stumpf, Representative, and  
Lloyd H. Ferber, Business Representative, Local 1304  
UNITED STEELWORKERS OF AMERICA  
610 Sixteenth Street—Room 219-220  
Oakland 12, California

Gentlemen, the following is in reply to your letter of July 29, 1959.

1. The introductory provisions of our Agreement with your Union provide in pertinent part:

"This Agreement shall continue in full force and effect to and including July 31, 1959, and shall be considered renewed from year to year thereafter between the respective parties unless either party hereto shall give written notice to the other of its desire to change, modify or cancel the same at least sixty (60) days prior to expiration."

Under date of May 26, 1959, you notified us of your desire to modify the Agreement and to meet with us for the purpose of negotiating a new Agreement to be effective August 1, 1959. Under the provision quoted above, our Agreement therefore will expire at midnight July 31, 1959, and will not be automatically renewed. See *American Woolen Company*, 57 N.L.R.B. 647. Our letter of July 27, 1959, was not an attempt to cancel the Agreement but was written in contemplation of the fact that it will, by its terms, expire at midnight, July 31, as set forth above.

2. Aside from the foregoing, the Agreement does not prohibit us from letting work to an independent contractor, and we have the right to do so. See *Amalgamated Association, etc., v. Greyhound Corporation*, 231 F.(2d) 585.

3. While it will be necessary for us to lay off or terminate employees heretofore performing the work to be taken over by the contractor, we do not contemplate any lockout.

4. As we stated in our letter of July 27, it appears to us that since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless. However, we repeat that we will be glad to discuss with you at your convenience any questions that you may have.

After Stumpf and Ferber had read the letter quoted immediately above, it was given to the members of the employees' negotiating committee who read it. Stumpf then stated that the committee was ready to negotiate a bargaining contract and inquired of Thumann whether Respondent had any counter-proposals to submit. Thumann replied, to quote from his credible testimony, "It would be pointless for us to proceed with any suggested modifications of the current agreement since, as of midnight, July 31, 1959, the contract would have been terminated by its own language, as the Union had opened the contract, and that as of that same time the Fluor Maintenance Corporation was taking over the maintenance work of the plant and, therefore, to negotiate any modifications of the agreement, that was being terminated by its own language at midnight, would be pointless." Stumpf maintained that the agreement had not terminated, nor would it terminate at midnight, July 31, because of the automatic renewal clause contained therein. Dave Arca, a member of the committee, then, to again quote Thumann, "indicated concern about the shortness of [notice to the Steelworkers] and also as to why [management was] contracting out maintenance work." Thumann thereupon stated that Respondent had only reached a definite decision to contract out the maintenance work to an independent contractor on July 27; that as soon as he was informed of Respondent's decision he passed the information along to the Steelworkers' representatives so that they would be in a position to discuss Respondent's contract intentions with him; that regardless of the bargaining contract's termination date he nevertheless would have notified the Steelworkers that Respondent was going to contract the maintenance work as soon as he was so advised. Thumann then remarked that during the bargaining negotiations in previous years he had, with the use of charts and statistical information, endeavored to point out "just how expensive and costly our maintenance work was and how it was creating quite a terrific burden upon the Em-



eryville plant" and that as late as 1958, he had stated to the negotiating committee, again with the aid of charts, Respondent's problem of high maintenance costs. Thumann also stated that certain other unions representing Respondent's employees "had joined hands with management, thereby bringing about an economical and efficient operation," but the Steelworkers, even though asked to do so, refused to cooperate in attempting to reduce maintenance costs.

Ferber then brought up the "short time" question. Thumann reiterated the statements he had just made to Arca about the "high cost" problems management had in the plant, adding that Respondent was convinced, after considering the matter for "quite a period of time," that it was more economical to have some independent contractor perform the maintenance work instead of continuing to perform that work with its own employees. Thumann also stated that if the employees or the Steelworkers desired to discuss the maintenance work contract at some later date they should say so and he would give the request due consideration.

When asked whether he would contact the various craft unions in an effort to have the employees about to be terminated retained on the job, Thumann stated that he had already gone to the Central Labor Council Building and informed the business agents of some of the various unions affiliated with the Labor Council about Respondent's contract with Fluor.

Thumann also stated at the aforementioned meeting that the men about to be terminated should apply to Fluor for jobs because he had already told Fluor's representative that some of the employees about to be terminated were very capable maintenance men and that said representative replied that he "would be most happy to interview them and discuss employment with them."

Thumann refused Stumpf's request that Respondent modify the current labor agreement so as to provide that all maintenance work to be performed under the Fluor contract be given to members of Local 1304, stating, "we had entered into this contracting of maintenance work for economy and efficiency of operation, and for us to tie the contractor's hands in any fashion, shape or form would be senseless."

On July 30, copies of the following was distributed by Respondent to its employees:

Nearly every month the cost of manufacturing the



products of American industry shoots up another couple of percentage points. In most industries, and Fibreboard is no exception, stiff competition makes it impossible to pass on these higher costs through increased prices. This "cost-price" squeeze has forced many companies, and again Fibreboard is no exception, to face the economic facts of life and control costs efficiently all along the line.

This cost control is vital to us at Fibreboard because it is one of the few ways to assure the company and its more than 6,000 employees a future of greater prosperity through more efficient service to its customers.

Here at Emeryville, the cost of doing maintenance work has grown steadily. Studies during the past two years have shown that maintenance of our facilities by an outside crew instead of by our own employees, would produce savings that would reduce the cost of our Emeryville products and make them more competitive.

Each of us is acutely aware of the implications of a decision to take this action. We have reached this decision only after long and careful study of all of the facts.

We are confident that maintenance employees affected by this action—who are members of highly skilled and specialized trades—will have little difficulty in finding new jobs in this time of great demand for skilled labor.

Fortunately, some of the employees affected will be able to share immediately in retirement benefits, which will provide them right away with some continuing income.

Additionally, we have prepared a program of termination allowances which would be distributed on a basis of length of service. For those who will share in retirement benefits, this termination allowance would be an added contribution to their income.

J. P. CORNELL, Manager

Emeryville Floor Covering Plant

W. L. MAFFEY, Works Engineer

Emeryville Utilities Group

E. W. TORBOHN, Manager

Emeryville Insulation Plant

E. J. VAUGHT, Manager

Emeryville Paint Plant

S. F. FRIDELL, Manager

Emeryville Roofing Plant & Felt Mill

At about 6 p.m. on July 31, the Steelworkers established a picket line about Respondent's Emeryville plant and it was still there at the time of the hearing.

Fluor's employees, although the written contract between Fluor and Respondent (to be effective as of August 1) was not actually executed by Respondent until August 4, started performing the maintenance work with the commencement of the July 31 midnight shift.

On July 31, each of the 50 or so terminated maintenance employees was handed a copy of the following:

Inasmuch as we have contracted out all powerhouse and maintenance work, we will no longer need your services. Here is the pay check due today and you will receive through the mails a termination allowance as shown on the personal statement memo.

Your pay check for this week will either be given to you at the close of the shift today or put in the mail tonight.

On August 21, at the request of Robert Ash, the secretary-manager of the Central Labor Council of Alameda (California) County, the Mayor of Emeryville conferred with Thumann and five other Respondent officials, Ash, the Steelworkers' publicity director, the president of Local 1304, and Emeryville's police sergeant, in an effort to settle the dispute between Respondent and the Steelworkers. It will serve no useful purpose to relate here at length what transpired at that meeting for the only proposal made was Ash's suggestion that Respondent put the discharged men back to work pending a determination by the Board or by the courts of the question of Respondent's right to contract out the work. Thumann, as he had done when Ash had made the suggestion to him previously, turned it down.

### ***B. Concluding findings***

The primary and principal question presented is whether substantial evidence on the record considered as a whole supports the allegations of the complaint, as amended, that Respondent's change of operations and its discharge of about 50 maintenance employees because of such change were illegally motivated.

It goes without saying that an employer's right to close

down his plant, or to lay off his employees or otherwise to alter his employees' tenure and working conditions, is circumscribed by the Act only insofar as its exercise does not impinge upon the employees' rights to organize and to engage in other concerted protected activities.<sup>7</sup> Thus, it is well-settled that an employer is free to suspend operations for business reasons which are not concerned with protected employee activity.<sup>8</sup> On the other hand, it is equally settled law that a lock-out or layoff prompted, not by business considerations, but by a purpose to defeat organization or other protected activities, is *prima facie* a violation of the Act.<sup>9</sup>

Thumann and Ben A. Wilson, Respondent's director of purchases, were two of Respondent's officers connected, in one way or another, in bringing about the contract which was eventually given to Fluor; they were the only witnesses who actually knew the motives for contracting out the maintenance work. Each of them testified directly and positively that the contract was made solely for economic reasons.

In substance, the credited testimony of Thumann and Wilson regarding the motives and the events leading up to the Fluor contract is as follows:

In 1954, Respondent being concerned over the high cost of maintenance of its plant initiated a study, which continued into 1956, of its maintenance costs and of the possibility of effecting economies by contracting out the work. The study definitely indicated that savings might be effected. Because other important business matters intervened, nothing was done about the study.

In late June of this year, Thumann told George Burgess, who had recently become Respondent's vice-president in charge of manufacturing, that the question of contracting out the maintenance work had been under consideration and since the contracts with the labor organizations representing the maintenance workers would be terminating shortly, he would like an early answer with respect to Respondent's desires in the matter.

Burgess immediately had the maintenance cost study

<sup>7</sup> *N.L.R.B. v. Jones & Laughlin*, 301 U. S. 1.

<sup>8</sup> *N.L.R.B. v. Goodyear Footwear Co.*, 186 F.2d 913 (C.A. 7); *Atlas Underwear Co. v. N.L.R.B.*, 116 F.2d 1020 (C.A. 3).

<sup>9</sup> See *Radio Officers' Union v. N.L.R.B.* 347 U. S. 17; *N.L.R.B. v. Wallick & Schwalm Co.*, 198 F.2d 477 (C.A. 3); *N.L.R.B. v. Somerset Classics*, 193 F.2d 613 (C.A. 2).

brought up to date. This study revealed that the maintenance costs of the plant amounted to approximately \$750,000 per year.

On or about July 14, Burgess requested Wilson to make a survey of the various maintenance contractors with the idea in mind that Respondent might want to contract out the maintenance work if such an arrangement would save it money. Wilson's investigations led him to Fluor and to three other maintenance contractors.

On July 27, Respondent received from Fluor a written plant survey. On the basis of this survey, coupled with discussions had with Fluor and the other contractors, Respondent estimated its savings by contracting out the maintenance work might run as high as \$225,000 per year. Accordingly, Respondent decided, on July 27, to give the contract to Fluor. Fluor was selected over the other contractors mainly because of its experience, reputation, and size.

A draft of a proposed contract was prepared on July 30 and 31, and submitted to Fluor on July 31, with a letter authorizing it to start work on August 3.

On August 4, the draft was revised and then signed by Respondent. Fluor's representative then took the signed agreement to Fluor's main offices, located in Los Angeles, for review by Fluor's attorneys. The contract, bearing Fluor's signature, was returned to Respondent on August 11.

The contract with Fluor is on a cost plus fixed fee basis and is for a term commencing at midnight, July 31, 1959, and ending at midnight, July 31, 1961, but is terminable by Respondent on 60 days' notice.

At the hearing, the General Counsel and, in his brief, counsel for the Steelworkers, vigorously attacked the adequacy of the business reasons advanced by Respondent. The issue is not whether the business reasons advanced were good or bad, but whether Respondent actually in good faith had business motives for contracting out the work, or whether the change in operation was illegally motivated.

The General Counsel and counsel for the Steelworkers contend that Respondent's real motive was to defeat the organizational activities of the employees and to oust the Steelworkers from its plant. They base their arguments not only from what they consider the weakness of Respondent's explanation of its economic reasons, but from such things as (a)

sequence of events, (b) the precipitate manner of accelerating the execution of the maintenance contract, (c) delay in fixing a date for a bargaining conference, and (d) refusal to bargain with the Steelworkers with respect to the Fluor contract or termination pay.

As to (a), the credible testimony of Thumann and Wilson clearly establishes that for at least five years Respondent had under consideration some method whereby it could reduce the plant's maintenance costs. Thumann, in June of this year, called Burgess' attention to this fact. Burgess thereupon brought the cost study up to date and had Wilson ascertain if the work could be performed cheaper by an independent contractor. Wilson's investigation revealed that Respondent could save about a quarter of a million dollars a year by allowing Fluor to perform the maintenance work.

As to (b), the General Counsel and counsel for the Steelworkers base their contention that Respondent's illegal notice in discharging the members of the Steelworkers and hence ridding the plant of that labor organization is inferable from the precipitate manner in which Respondent entered into the contract with Fluor. The undersigned does not believe that, because Respondent accelerated the maintenance change in order to avoid a renewal of the contract with the Steelworkers, which, by its terms, was about to expire, it necessarily follows that the original decision to contract out the maintenance work was to defeat the Steelworkers or was done for any reason violative of the Act. It is the motive for the decision to contract out the work that is material to this controversy rather than the motive for accelerating the changeover.

As to (c), Thumann's delay in arranging a negotiating meeting was due solely to the fact that he was awaiting management's decision on the question whether or not to contract out the maintenance work. The record is barren of any indication that Respondent or Thumann manifested any present or past union animus, that it or he was motivated by any improper consideration in delaying fixing a date for a negotiating meeting, or that it or he desired to avoid management's collective bargaining obligations. These findings are buttressed by the fact that in 1957 the first bargaining meeting was not held until July 23; that the first 1958 bargaining meeting was not held until July 13; and that the 1958 bargaining contract was not signed until September 24.

As to (d), the credible evidence clearly establishes that the Fluor contract was entered into for *bona fide* business reasons and not as a part of any scheme for evading any statutory obligation. Respondent therefore was under no obligation to bargain with the Steelworkers for any unit of employees which included maintenance workers because upon the execution of the Fluor contract it no longer had any such workers in its employ. The services of the maintenance employees were validly terminated when Respondent, in the exercise of its business judgment, decided to contract out the maintenance work.

The General Counsel and the Steelworkers also contended that Respondent violated Section 8(a) (5) of the Act because it refused to bargain with the Steelworkers regarding the maintenance employees' termination pay. The record does not support such a contention. On the other hand, the credible evidence discloses that at the July 27 meeting Thumann told Ferber and Stumpf that not only was Respondent prepared to give the terminated employees whatever termination pay due under the bargaining contract, but it was giving them additional allowances and benefits not called for under said contract. Again at the July 30 meeting with Stumpf, Ferber, and the negotiating committee, Thumann brought up the subject of termination pay and outlined what Respondent intended to give the terminated employees. No objections or proposals were made by any Steelworkers' representative at either meeting or since.

Relying heavily upon *N.L.R.B. v. Lion Oil Company and Monsanto Chemical Company*, 352 U. S. 282, the General Counsel and counsel for the Steelworkers maintain that Respondent violated Section 8(d) of the Act because it did not serve the statutory notice of its intention to terminate the bargaining contract. Said counsel seem to misconstrue the Court's opinion in that case as well as the requirements called for by Section 8(d). As the Court in the *Lion* case said:

In this case we are called upon to interpret Section 8(d). . . . In particular we are concerned with Section 8(d) (4), which provides that a party who wishes to modify or terminate a collective bargaining contract must "continue . . . in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after . . . notice [of his wish to modify or terminate] is given or



until the expiration date of such contract whichever occurs later."

Here, the contract terminated at midnight on July 31, not only by its terms but also by reason of the Steelworkers' May 26 notice. It cannot be said, with any degree of success, that the proposed contract changes submitted by the Steelworkers were not substantial. In fact, the proposals were very substantial and affect each "cost" provision of the then existing contract. Under the circumstances, Respondent was under no statutory duty to serve any notice called for under Section 8(d). Since the Steelworkers' May 26 notice requesting bargaining meetings looking toward a "new contract" was timely served, the automatic renewal clause of the contract in question fell with such service, and the undersigned so finds.

Upon the record as a whole, the undersigned finds that the allegations of the complaint, as amended, that Respondent had engaged in certain acts and conduct violative of Section 8(a) (1), (3) and (5) of the Act are not supported by substantial evidence. Accordingly, the undersigned recommends that the allegations of the complaint, as amended, that Respondent violated Section 8(a) (1), (3) and (5) of the Act be dismissed.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

### **Conclusions of Law**

1. Fibreboard Paper Products Corporation, Emeryville, California, is engaged in, and during all times material herein was engaged in, commerce within the meaning of Section 2 (6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO, and its Local Union 1304, are labor organizations, within the meaning of Section 2(5) of the Act.

3. The allegations of the complaint, as amended, that Respondent has engaged in, and is engaging in, unfair labor practices, within the meaning of Section 8(a) (1), (3) and (5) of the Act, have not been sustained by substantial evidence.

### **RECOMMENDATIONS**

It is recommended that the complaint, as amended, be dismissed in its entirety.

In the event no exceptions are filed, as provided by the

Rules and Regulations of the Board, Series 6, as amended, the findings, conclusions and recommendations herein contained shall, as provided in said Rules and Regulations, be adopted by the Board and become its findings, conclusions and order, and all objections thereto shall be waived for all purposes.

Dated this                      day of November 1959.

HOWARD MYERS  
Trial Examiner

**EXCERPTS FROM TRANSCRIPT OF TESTIMONY**

*Before the*

**NATIONAL LABOR RELATIONS BOARD**

Docket No. 20-CA-1682

In the Matter of:

**FIBREBOARD PAPER PRODUCTS CORP.**

and

**EAST BAY UNION OF MACHINISTS, LOCAL 1304  
UNITED STEELWORKERS OF AMERICA, AFL-CIO**

and

**UNITED STEELWORKERS OF AMERICA, AFL-CIO  
San Francisco, California  
September 21, 1959**

Pursuant to notice, the above-entitled matter came on for hearing at 10:15 o'clock, a.m.

**BEFORE:**

**HOWARD MYERS, Trial Examiner.**

**APPEARANCES:**

**DAVID E. DAVIS and EDWARD J. McFETRIDGE,**  
630 Market Street, San Francisco, California, appearing on behalf of the General Counsel, National Labor Relations Board.

**DARWIN & PECKHAM by JAY A. DARWIN,**  
68 Post Street, San Francisco, California, appearing on behalf of East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, Charging Party.

**BROBECK, PHLEGER & HARRISON by  
MARION B. PLANT and JAMES K. PARKER**  
111 Sutter Street, San Francisco, California, appearing on behalf of Fibreboard Paper Products Corp., Respondent.

• • • • •  
**R. C. THUMANN**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

**TRIAL EXAMINER:** What is your name, sir?

**THE WITNESS:** R. C. Thumann.

**TRIAL EXAMINER:** Mr. Thumann, where do you live?

**THE WITNESS:** 59 Prospect Road, Piedmont.

**TRIAL EXAMINER:** You may be seated, sir.

**THE WITNESS:** Thank you.

**TRIAL EXAMINER:** Mr. Davis, you may proceed with the examination of Mr. Thumann, who has been duly sworn.

### Direct Examination

**Q. (By Mr. Davis)** Mr. Thumann, you are employed by Fibreboard?

**A.** Correct.

**Q.** In what capacity?

**A.** Director of Industrial Relations.

**Q.** How long have you been so employed?

**A.** Since 1949.

**Q.** And in your position as Director of Industrial Relations, you are the chief negotiator with the various unions?

**A.** Right.

**Q.** And one of the unions you have been negotiating with since you have held this position is Local 1304 and the United Steelworkers of America?

**A.** Correct.

. . . . .

Will you stipulate that this is a copy of the contract between the Respondent and the Steelworkers, which was effective August 1, 1958, to and including July 31, 1959?

**MR. PLANT:** So stipulated, subject to a check of the document.

**TRIAL EXAMINER:** Very well. Go ahead, Mr. Davis.

. . . . .

**Q. (By Mr. Davis)** Now, Mr. Thumann, would you describe briefly the physical layout of the plant, the Fibreboard plant at Emeryville?

**A.** Yes. It is approximately fifty acres, and on the south side is Powell Street, on the east side is the Southern Pacific Railroad tracks, on the north side is the continuation of 64th Street, and on the west side is the East Shore Highway. The entrance to the plant, used by employees, is through the 64th

Street entrance. The truck entrance, and also used by some employees, is on Powell Street.

**TRIAL EXAMINER:** When you say "truck entrance," do you mean for deliveries?

**THE WITNESS:** For deliveries and taking away merchandise.

**Q.** (By Mr. Davis) And the inside of the plant has certain areas for production. Would you describe that, please?

**A.** Yes. There is a building materials department, manufacturing section as well as warehouse section; there is the floor covering division, including manufacturing and warehousing; there is an industrial insulation plant, which includes manufacturing and warehousing; there is the paint plant, which includes manufacturing and warehousing; there is a power house, machine shops, and other rooms, dressing rooms and things of that sort.

**Q.** Are the power house and machine shops located in one building?

**A.** The power house is located in one building. The various machine shops are in various plants.

**Q.** How many plants are there in total?

**A.** There are four plants.

**Q.** And has each plant a name?

**A.** Yes.

**Q.** Will you give us those?

**A.** Building materials plant, the industrial insulation plant, the floor covering plant, and the paint plant.

**Q.** And in what plant is the power house located?

**A.** The power house is not located in any plant. It is a separate unit by itself.

**Q.** That would be a fifth unit?

**A.** That's right.

**Q.** Is the power house an around-the-clock operation?

**A.** It is.

**Q.** And how many employees are employed in the power house?

**A.** Roughly, if my memory serves me right, it is approximately between 28 and 11.

Q. And they work around the clock on various shifts?

A. That's right.

Q. And that is a permanent matter, it is something that is needed around the clock?

A. That's right.

• • • • •

Q. The maintenance machinists and mechanics, where do they work, that are in this unit?

A. They work all around the plant. They work in the four plants that I mentioned before, as well as working in a central shop.

Q. As needed, is that correct?

A. As needed.

Q. Now, sometime in 1951, Mr. Thumann, this unit was certified by the Board for the purposes of a unit shop election, was it not?

• • • • •

A. As to the date, I don't recall, but I know it was certified for a union shop.

Q. Election?

A. Election, yes.

TRIAL EXAMINER: Prior to 1952 when Congress amended the Act?

THE WITNESS: Yes, that's right.

Q. (By Mr. Davis) I show you a document which is marked for identification as General Counsel's Exhibit No. 3 and ask you what it is, please?

• • • • •

A. This document is a letter that was mailed on May 26th and received in my office on May 29, in which is announced—

MR. PLANT: I will object to any testimony as to what the document contains. It speaks for itself.

TRIAL EXAMINER: It is a paper that you received, and it is dated May 26th, 1959?

THE WITNESS: Right.

TRIAL EXAMINER: And when did you say you received it?



THE WITNESS: May 29.

TRIAL EXAMINER: That is all.

MR. DAVIS: I am offering this document in evidence as General Counsel's Exhibit No. 3.

TRIAL EXAMINER: Any objection?

MR. PLANT: No objection.

TRIAL EXAMINER: There being no objection, the paper is received in evidence, and I will ask the Reporter to kindly mark it as General Counsel's Exhibit No. 3.

Q. (By Mr. Davis) Now, in reply to that letter of May 26, which is in evidence as General Counsel's Exhibit No. 3, I show you a photostat copy of a letter and ask you if that is the letter that you sent in reply.

A. That's right.

MR. DAVIS: I am offering General Counsel's No. 4 in evidence.

TRIAL EXAMINER: There being no objection, the paper is received in evidence, and I will ask the Reporter to kindly mark it as General Counsel's Exhibit No. 4.

Q. I show you a document which is marked for identification as General Counsel's Exhibit No. 5 and ask you to describe what it is.

A. It is a paper I received, dated June 15, and it was received in my office on June 16, 1959.

Q. And this is a communication from whom?

A. It is from East Bay—

TRIAL EXAMINER: Purportedly.

A. (Continuing) Purportedly from East Bay Union of Machinists, Local 1304, U. S. of A., AFL-CIO.

Q. (By Mr. Davis) And did this letter contain an attachment headed "PABCO Proposals for 1959"?

A. Yes.

MR. DAVIS: It is marked General Counsel's Exhibit No. 5, and I am now offering it in evidence.

MR. PLANT: Let the record show that Exhibit 5 consists both of the letter of June 15th and of the attachment.

TRIAL EXAMINER: There being no objection, the papers are received in evidence, and I will ask the Reporter to kindly mark them as General Counsel's Exhibit No. 5, and the exhibit consists of a letter or a paper, rather, dated June 15, 1959, to which is attached a one-sheet enclosure, and the General Counsel may substitute photostats in lieu of the originals of these two papers.

Q. And General Counsel's Exhibit 6-A for identification is a letter dated July 27, 1959, from you to Mr. Stumpf as representative of the Steelworkers, is that correct?

A. That's right.

Q. And 6-B is the same letter to Mr. Ferber, is that correct?

A. That's right.

MR. DAVIS: I am offering General Counsel's 6-A and 6-B in evidence.

TRIAL EXAMINER: There being no objection, the papers are received in evidence, and I will ask the Reporter to kindly mark them as General Counsel's Exhibits Nos. 6-A and 6-B, and General Counsel may substitute photostats thereof in lieu of the originals.

Q. (By Mr. Davis) I show you a document which is

marked as General Counsel's Exhibit No. 7 and ask you what it is.

• • • • •

TRIAL EXAMINER: He just wants to describe it. It is a piece of paper dated such-and-such, purported to be signed by so-and-so.

A. It is a piece of paper dated July 29, 1959,—

TRIAL EXAMINER: Purportedly.

A. (Continuing)—and received on the same day.

TRIAL EXAMINER: By whom?

THE WITNESS: It is addressed to myself, and it is purported to be signed by Mr. Stumpf and Mr. Ferber, and it is on the stationery of the United Steelworkers of America.

Q. (By Mr. Davis) And you did receive that?

A. I did receive it.

MR. DAVIS: I am offering General Counsel's No. 7 in evidence.

• • • • •

TRIAL EXAMINER: There being no objection, the paper is received in evidence, and I will ask the Reporter to kindly mark it as General Counsel's No. 7, and the General Counsel may substitute a photostat in lieu of the original thereof.

• • • • •

Q. (By Mr. Davis) Now, Mr. Thumann, I show you a document which is marked as General Counsel's Exhibit No. 8. Did you send the original of that to the Union?

• • • • •

A. I did.

• • • • •

Q. (By Mr. Davis) You sent this on July 30?

A. On July 30. I delivered it by hand to Mr. Stumpf and Mr. Ferber.

TRIAL EXAMINER: You mean you gave each a copy?

THE WITNESS: I gave each an original copy.

MR. DAVIS: I am offering General Counsel's No. 8 in evidence, and ask permission to withdraw the original and substitute two copies.

• • • • •

**TRIAL EXAMINER:** There being no objection, the paper is received in evidence, and I will ask the Reporter to kindly mark it as General Counsel's Exhibit No. 8, and the General Counsel may substitute a photostat in lieu of the original thereof.

Q. (By Mr. Davis) Now, subsequent to your sending the letter dated June 2, which is General Counsel's Exhibit No. 4,—  
**TRIAL EXAMINER:** Wait a minute. Show it to the witness, please.

Q. (By Mr. Davis)—did you arrange any meetings with the Union?

A. Yes, I arranged a meeting for July 30.

Q. Did you arrange any meeting, or did you make any arrangements prior to July 30?

A. Yes. I phoned Mr. Stumpf and asked him to meet me at Pland's Restaurant on the evening of—or late afternoon of July 27 and to bring Mr. Ferber along.

**TRIAL EXAMINER:** What is the name of that—

**THE WITNESS:** Pland's Restaurant, on Broadway and MacArthur Boulevard, in Oakland.

Q. All right. So referring to August 21, your Answer states that there was a negotiating meeting on that date. I would like to know the subjects that were discussed at that meeting.

A. Yes. The Mayor invited me to a meeting that was—

**TRIAL EXAMINER:** The Mayor of what?

**THE WITNESS:** The Mayor of Emeryville.

A. (Continuing)—that was being called at the request of Mr. Bob Ash and his committee. Mr. Ash is the Secretary-Manager of the Central Labor Council of Alameda County.

**TRIAL EXAMINER:** What is his first name?

**THE WITNESS:** Robert.

**TRIAL EXAMINER:** What was discussed at the meeting.

A. At that meeting Mr. Robert Ash announced that he had asked the meeting to be called and that he had a proposal to make.

**TRIAL EXAMINER:** Well, first of all, who was there?

**THE WITNESS:** The Mayor of Emeryville, Sergeant Steeves of the Emeryville Police Department, Robert Ash of the Central Labor Council, a gentleman whose name I do not recall, but he said he was the Publicity Director for the Steelworkers Union, and Robert Smith, who was President of Local 1304, East Bay Union of Machinists.

**TRIAL EXAMINER:** And was there anybody there representing the Company?

**THE WITNESS:** Yes.

**TRIAL EXAMINER:** Who?

**THE WITNESS:** With me at the meeting was Mr. Robert Baldwin, our Personnel Manager of the Emeryville Plant; Mr. Cornell, Plant Manager of the floor covering department; Mr. Maffey, our utilities engineer of the Emeryville Plant; Mr. Fridell,—

**Q. (By Mr. Davis)** Well, as long as we have got that far, let's get the entire background.

**MR. PLANT:** Have you finished your answer?

**A. (Continuing)** Mr. Dick Conlon.

**Q. (By Mr. Davis)** Mr. Thumann, where did this meeting take place?

**A.** In the City Hall, Second Floor, of the City of Emeryville.

**Q.** On August 21?

**A.** That's right.

**Q.** At what time?

**A.** At approximately 3:30 in the afternoon.

**Q.** And how were you notified of this meeting?

**A.** The day before, Mayor Lacoste called me on the telephone.

**Q.** And what did he say to you?

**A.** He wanted to know if I would be willing to attend a meeting in his office, as Mr. Ash of the Central Labor Council had requested such a meeting to be held.

**Q.** Did he tell you the purpose of the meeting?

**A.** The purpose of the meeting, yes, was to see if this matter that had brought the picket lines around the plant could be resolved.

**Q.** And—

**TRIAL EXAMINER:** What was your answer?

**THE WITNESS:** I told him I would be most happy to meet him.

Q. (By Mr. Davis) And then you arrived with these gentlemen representing the Company, is that correct?

A. That's right.

Q. And when you arrived there, you saw Mr. Ash and these other gentlemen you named?

A. That's right.

Q. Was Mr. Ferber there?

A. When we arrived in front of the City Hall in Emeryville we saw the gentlemen I mentioned coming from cars, going in, and we also saw in a car Mr. Ferber and Mr. Stumpf. They did not come to the meeting.

Q. They did not come to the meeting?

A. That's right.

Q. Neither Mr. Stumpf nor Mr. Ferber came to the meeting?

A. That's right.

Q. You said there was the President of Local 1304 present.

A. That's right.

Q. Is he an employee of—

A. No.

Q. —of Fibreboard?

A. No.

Do you know who were the members of the negotiating committee of the Union and—

THE WITNESS; The members of the committee who attended the meeting on July 30 in the conference room in the Emeryville plant were not in attendance.

Q. (By Mr. Davis) And on July 30, of course, they were introduced to you as the negotiating committee?

A. No, they were not.

Q. Did you know that that was the case?

A. Yes.

Q. You knew that?

A. Yes.

Q. How did you know that?

A. From prior years.

Q. And in prior years you always negotiated with the negotiating committee, is that correct?

A. That's right.

Q. In addition to Mr. Ferber and Mr. Stumpf?

A. That's right.



Q. And that was not the kind of committee present on August 21, is that correct?

A. That's right.

Q. Now, will you tell us what occurred at this meeting of August 21?

A. Mr. Ash immediately made a proposal, and that proposal was that the members of 1304 be put back to work in the Emeryville plant and the picket line would be withdrawn, and that the matter then would be determined by the NLRB or appropriate courts as to whether the issue was right that management had undertaken to do.

I countered and told Mr. Ash that I did not wish to appear hasty, but he had called me some few weeks before, made the same suggestion. That call had been followed by a call from Mr. Stumpf later in the evening, who wanted to know if Mr. Ash had contacted me on that matter, and therefore I was going to give him the same answer that I gave him when he originally called me.

TRIAL EXAMINER: Gave whom?

THE WITNESS: Mr. Ash, and also to Mr. Stumpf later in the evening. Mr. Ash and I had discussed the matter at quite some length over the telephone, and when I pointed out to him that there were several problems connected with trying to work out what he suggested—

TRIAL EXAMINER: Wait a minute. Let me follow you. This was repeated at the August 21 meeting?

THE WITNESS: It was repeated on August 21.

TRIAL EXAMINER: And when did you first have the telephone call with Mr. Ash?

THE WITNESS: As I recall, it was just about two weeks prior to the August 21 meeting.

TRIAL EXAMINER: And the evening of your talk—

THE WITNESS: The same evening.

TRIAL EXAMINER:—the evening of your talk with Mr. Ash, you had a talk with Mr. Stumpf?

THE WITNESS: Over the telephone.

TRIAL EXAMINER: All right. Both were over the telephone?

THE WITNESS: Both were over the telephone.

Q. (By Mr. Davis) Mr. Thumann, would you direct your answers to what occurred on August 21?

TRIAL EXAMINER: He is, but I was trying to clear up something.

MR. DAVIS: All right.

Q. (By Mr. Davis) Would you please—

A. That's right.

Q. —continue?

A. In that meeting of August 21 I reminded Mr. Ash that I had talked with him over the telephone and that my answer was the same as it was at that time, it was not hasty, and that was that there was not a possible thing to do and I would suggest that he would withdraw the picket lines and that the Fluor Maintenance people would continue or would do the work that they were contracted for to do, and that the matters would be resolved by the NLRB or appropriate courts, and that if the 1304 believed that they were right, undoubtedly the members who were affected and who would return to work, if that was the case, would undoubtedly be made whole.

Mr. Ash immediately replied and said that he couldn't sell that to the 1304 membership, so did Mr. Smith and so did the other gentlemen from the Steelworkers Union.

TRIAL EXAMINER: I don't quite follow you. I thought you said at the beginning that Mr. Ash said, "Now, we will withdraw the picket line if you put the men back, and then leave it up to the NLRB or some courts."

THE WITNESS: That's right.

TRIAL EXAMINER: And then you came around and offered the same proposition?

THE WITNESS: No. I said for him to withdraw the picket line but the Fluor Maintenance employees would do the maintenance work in the plant.

TRIAL EXAMINER: But you didn't mention anything about the NLRB?

THE WITNESS: I said this, that then the matter would proceed through the NLRB or through the courts, and after the determination was made as to whether the matter was right in contracting out this maintenance work, then whatever that decision was, if the decision was that we were wrong and the 1304 employees should be restored to their jobs, they would undoubtedly be made whole.

TRIAL EXAMINER: Given back pay?

THE WITNESS: That's right.

TRIAL EXAMINER: What difference was there between you and Ash at that time?

THE WITNESS: Ash suggested that the members go back to work—

TRIAL EXAMINER: Immediately?

THE WITNESS: Immediately, that's right.

TRIAL EXAMINER: And?

THE WITNESS: And then have the issue resolved. And I suggested that they do not go back to work because they would be made whole, and also it would permit the other 615 employees who would not receive any back pay, when they got back to work, or unemployment compensation, would be able to be restored to their jobs and the plant would be in operation.

TRIAL EXAMINER: Now I understand.

Q. (By Mr. Davis) I might as well ask you at this time, Mr. Thumann, how many employees were represented by 1304 in this unit?

A. Who were working on the 31st of July?

Q. Yes.

A. Approximately fifty.

Q. (By Mr. Davis) Now, on July 27 there was a meeting between you and Mr. Stumpf and Mr. Ferber in Pland's Restaurant. How did that meeting come about?

A. As soon as I was informed by management on the morning of July 27 that the decision had been reached that maintenance work would be contracted out, I immediately went to the telephone and phoned Mr. Stumpf, whom I reached at the offices of the East Bay Union of Machinists. That was shortly before noon. I informed him that I had a matter of considerable import to talk to him about and asked that he and Mr. Ferber meet with me as soon as possible.

He told me that they had some negotiation meetings or meeting lined up for that afternoon with Grove Regulator and that I should phone him in the afternoon.

I did phone him in the afternoon, and Mr. Ferber told me it would be possible to meet with me at Pland's Restaurant at 5:30 that afternoon.

Q. And where in Pland's Restaurant did you meet?

A. Broadway and MacArthur Boulevard in Oakland, California.

Q. In what part of the restaurant?

A. We met in the upper level dining room area.

Q. And how long were you there?

A. I would say we were there about, oh, half an hour.

Q. Was any negotiating committee there?

A. No. Mr. Ferber and Mr. Stumpf.

TRIAL EXAMINER: Just the three of you?

THE WITNESS: Just the three of us.

Q. (By Mr. Davis) How did the meeting commence?

A. Mr. Ferber told me that I would receive through the mail the first part of the week a letter from the Central Labor Council in which he had asked for strike sanction against the plant.

I told him the reason I had requested the meeting was that I had something of considerable import to discuss with them, and I handed to Mr. Stumpf and to Mr. Ferber an Ozalid copy of a letter that was going through the mails to them.

Q. And that was General Counsel's Exhibit No. 6-A and Exhibit No. 6-B, is that correct?

A. Right. They both read the letter and expressed concern, indicated that it could not be done, that if we did do it a picket line would be put around the plant.

I questioned as to why they said we could not contract out maintenance work.

The conversation soon developed that they were concerned with 1304 doing the maintenance work and the picket line, when I questioned further, would be against the contractor for the purpose of having him employ 1304 people.

I suggested that they contact their counsel, which they told me they intended to do, to make dead certain that such work—that they were right in the approach that they were taking.

I told them that we had planned to give pro rata vacations, which was not in our contract, but we would do that up and above the contract upon termination, and that we would arrange termination pay that was predicated upon the employees of from five to ten years of service of four weeks' pay, and from ten to fifteen years of service, five weeks' pay, from fifteen to twenty years' service, six weeks' pay, and over twenty years, seven weeks' pay, and that all of the pension rights that any of the employees would have would certainly be theirs, such as some I knew would be able to retire, others would have vested interests, and others would have optional early retirement, and those who were not taken care of for

some pension rights would, of course, receive their contributions back again in keeping with the pension plan at 2 per cent compounded interest.

I was asked as to who the contractor would be. I told Mr. Ferber and Mr. Stumpf that was being decided between two contractors. Mr. Ferber asked me if I would let him know the next day as to who the contractor would be. I told him I would.

Q. Did Mr. Ferber and Mr. Stumpf tell you that many of the employees had twenty and thirty years of seniority there, that they were going to protect the employees' rights?

A. No.

Q. They did not?

A. Not at that time.

Q. Did they tell you they were going to protect the rights of the Union members to work on those jobs?

A. Mr. Stumpf told me that there had been court cases and NLRB decisions which said that while you could contract out the work, nevertheless the people who had been doing the work before would continue to do the work.

Q. And did he say he was going to protect the rights of those people?

MR. PLANT: Objected to as asked and answered.

TRIAL EXAMINER: Overruled.

MR. DAVIS: Answer the question.

A. I suggested to him that he should contact his counsel.

TRIAL EXAMINER: Will the Reporter please read the question for the witness?

(Question read.)

A. He said that he intended to see that the work was performed by 1304 people.

Q. (By Mr. Davis) He didn't use the words "protect the rights of these people"?

A. Not to my recollection.

Q. Now, before arriving at a decision to contract out the work, you had not consulted with the Union or a Union representative at any time, is that correct?

A. Before?

Q. Yes.

A. No.

Did you at any time prior to this date of July 27 discuss

or take up or notify the Union of your intention or the Company's intention to contract out this work?

THE WITNESS: No.

Q. (By Mr. Davis) Did you discuss that question on July 27?

A. You have lost me. Discuss what?

Q. The question of whether or not the Company would contract out the work.

MR. PLANT: Objected to as asked and answered. The witness has already testified to that.

TRIAL EXAMINER: I will overrule the objection.

A. There was nothing in the conversation that would bring that up for discussion. I submitted the letter, discussed the reasons for doing it, and there was never any discussion. The only discussion was to get a picket line—

Q. (By Mr. Davis) Did they discuss the Company's right to do so?

. . . . .

A. The conversation at the beginning was of great concern, and I am quite sure that both gentlemen made remarks that they reversed themselves on somewhat later on in our conversation. That was all at the beginning, that we couldn't do such a thing, and then it developed later on that what was really meant was that 1304 people should do the work, and there was no question as to our contracting out maintenance work. As a matter of fact, Mr. Stumpf told me that there were many NLRB and court decisions on that very matter.

MR. PLANT: That is, he told you or—

THE WITNESS: Mr. Stumpf told me.

TRIAL EXAMINER: That an employer may do so?

THE WITNESS: That's right, and that the work should be performed, however, by the people who had been doing it before.

. . . . .

TRIAL EXAMINER: Stumpf said that the Labor Board, meaning the National Labor Relations Board,—

THE WITNESS: That's right.

TRIAL EXAMINER:—said that an employer may contract out certain work, provided that the Union that was in the plant could—that its members had it performed that way?

THE WITNESS: That's right.



**TRIAL EXAMINER:** Therefore, he didn't agree with you in saying that the subcontractor or whoever you were going to contract the work out to—

**THE WITNESS:** He didn't disagree.

**TRIAL EXAMINER:** Well, he disagreed insofar as he was saying that you had no right to tell the contractor who to hire and who not to hire, is that right; was that brought up?

**THE WITNESS:** I told— Yes, I told him that I was not in a position to tell the contractor whom he should hire and whom he should not hire, that is the contractor's own—

**TRIAL EXAMINER:** And Stumpf said that the Labor Board said so-and-so and so-and-so?

**THE WITNESS:** Right.

. . . . .

**Q. (By Mr. Davis)** Mr. Thumann, how did the meeting of July 30 come about?

**A.** The meeting on the evening of July 27, when I met with Mr. Stumpf and Mr. Ferber, Mr. Ferber suggested that we should have a meeting perhaps on Thursday. And then the next day when I phoned Mr. Ferber to let him know that the Fluor Maintenance people would be doing the work, Mr. Ferber then suggested that we meet on Thursday morning. And I told him that Thursday afternoon at 1:30 would fit in better with my calendar, and he agreed to that.

**Q.** Is that the entire conversation on the telephone with Mr.—

**A.** No, it was not.

**Q.** Would you give us the rest of it?

**A.** The conversation on the telephone was the result of my having told Mr. Ferber that I would let him know who the contractor was. I called him up and told him that it was to be the Fluor Maintenance Company.

He said that he was very sorry to hear that, that it would certainly mean trouble and a picket line.

I asked him if he had consulted with his attorneys relative to the matter and whether—and he said that he had.

And I said, "Did you also consult in regard to what we did as to contracting out maintenance work?"

And he said, "No, I have not gone into that matter that deep. All I did was to go in to determine that the work should be performed by members of our Union."

TRIAL EXAMINER: Is it correct that this conversation took place over the telephone on July 27?

THE WITNESS: July 28th.

TRIAL EXAMINER: 28th. Did you call Mr.—

THE WITNESS: I called Mr. Ferber.

Q. (By Mr. Davis) Continue. Tell us what the conversation was.

A. We discussed the meeting that was to take place the next day. Mr. Ferber indicated—

TRIAL EXAMINER: What do you mean by "the next day"?

THE WITNESS: I mean on Thursday, the 30th. This was Tuesday. And Mr. Ferber indicated that he would like to have it in the morning as he had some appointments in the afternoon, but after discussion on that matter we finally worked it out because he was able to, or felt he could postpone the meetings of Thursday afternoon.

Q. (By Mr. Davis) Is this all that you recall?

A. (No response.)

Q. Mr. Ferber requested a meeting, did he not?

A. What?

Q. In this telephone conversation, Mr. Ferber requested a meeting, did he not?

A. Monday evening when I talked with him at Pland's Restaurant, he suggested that we should have a meeting, and the reason he gave at that time for having a meeting was so as to keep the boys from becoming excited and walking off the job before the contract had reached its anniversary date or it was terminated.

Q. Did he ask for a meeting on the telephone?

A. Yes, on Thursday.

Q. What did you reply when he asked for a meeting?

A. I asked him for what purpose did he wish to have a meeting.

Q. What did he say?

A. He said that he wished to have it on record as what the Company was planning to do.

Q. And what did you say to that?

A. And I told him that was agreeable to me.

Q. Didn't you ask him if he meant by that that he wanted the record to show that they had decided to contract out the work?

A. That's right.

Q. And he said yes?

A. Yes, that's right.

Q. And you said a registered letter would do that?

A. I said that the registered letter would show that to meet for negotiation purposes would be pointless.

Q. Didn't you say the registered letter would do that?

A. Would do that, yes, I did.

Q. With reference to—That the Company had decided to contract out the work?

A. That's right, that's right.

Q. And he told you that the letter had not reached him?

A. That's right.

Q. But regardless, he wanted the committee to hear it verbally?

A. That's right, right.

TRIAL EXAMINER: Now, wait a minute.

Q. (By Mr. Davis) And—

TRIAL EXAMINER: Wait a minute. Will you pardon me a minute? I just want to get this chronology straight in my own mind.

On July 27—

MR. DAVIS: We are talking about the phone call of July 28.

TRIAL EXAMINER: The 28th. Did you have a meeting the day before with—

THE WITNESS: The evening before, on July 27th, which was a Monday night, I met with Mr. Stumpf and Mr. Ferber at Pland's Restaurant.

TRIAL EXAMINER: Is that the time you gave them a copy of the letter?

THE WITNESS: That's correct.

TRIAL EXAMINER: And then the next day you had a conversation about a registered letter?

THE WITNESS: That's right. At the time I gave Mr. Stumpf and Mr. Ferber a copy of the letter I told them that a letter was coming through the mails to them, telling them the same thing as what was being said in this letter, as it was a copy of what was going through the mails to them.

TRIAL EXAMINER: So on the 28th he said he still did not get the letter?

THE WITNESS: That I had sent through the mails to him.

TRIAL EXAMINER: All right.

THE WITNESS: Correct.

Q. (By Mr. Davis) You had suggested Friday morning as the time for a meeting, that would be July 31, is that correct?

A. No, no. We had tentatively set up Thursday as the day on which we would meet on Monday evening.

Q. But in this phone conversation—

TRIAL EXAMINER: You mean on Monday evening you set up the date tentatively for Thursday?

THE WITNESS: For Thursday, correct.

TRIAL EXAMINER: Why did you call him on Tuesday?

THE WITNESS: As a result of my promise to him the night before to let him know who the contractor would be.

TRIAL EXAMINER: Oh.

Q. (By Mr. Davis) And yet on Tuesday when you called him,—

A. On Tuesday, the 28th, correct.

Q. —when you called him and he requested a meeting on the phone, you told him for what purpose the meeting would be, is that correct, you asked him for what purpose?

A. That's right, that's right.

Q. (By Mr. Davis) And he replied, "To get the Company's position on record"?

A. That's right.

Q. And isn't it a fact that you suggested Friday morning as the time for a meeting?

A. I don't recollect.

Q. And he said, "We had better hold it on Thursday," and he preferred the morning as he had an afternoon meeting,—

A. Yes.

Q. —is that correct?

A. Yes, I think you are right, because I recall that he preferred it on Thursday morning.

Q. And you did suggest Friday morning?

A. Correct.

Q. And then you told him you were tied up Thursday in the morning?

A. That's right.

Q. (By Mr. Davis) You told him you were tied up Thursday morning, is that correct?

A. That's right.

Q. And he said no, he would cancel his Thursday meetings so you could meet on Thursday?

A. Yes. Let's get this straight, Mr. Davis. Monday evening, Mr. Ferber and I set up a date tentatively.

Q. We are talking about Thursday—Tuesday?

A. Tentatively for Thursday, then on Tuesday, when I phoned Mr. Ferber and he suggested about the meeting, I suggested Friday. He said he wanted it Thursday morning, and I said, "I can't because I am tied up on Thursday morning."

And he said he had a date for Thursday afternoon, so I then suggested Friday, and he said, "Well, I think I can postpone my Thursday afternoon meeting."

I said, "Fine, then we will meet Thursday afternoon."

Q. So he told you he was going to cancel or postpone his Thursday afternoon meeting so you could meet on Thursday, is that right?

A. That's right.

Q. Okay. Did you meet on Thursday?

A. We did.

Q. And that was on July 30?

A. Right.

Q. And where did you meet?

A. We met in a conference room of the personnel building at the Emeryville Plant.

Q. What time?

A. The meeting was set for 1:30, but we got together about 2:00 o'clock.

Q. And who was present?

A. I beg your pardon?

Q. Who was present?

A. For the Union there was Mr. Stumpf, Mr. Ferber, Mr. Arca and various members who are a part of the negotiating committee and who are employees in the plant, Mr. Arthur Hellender, who is an assistant to Mr. Robert Ash of the Central Labor Council, for management there was Mr. Baldwin, Mr. Maffey, Mr. Lorentzen and Mr. Fridell.

Q. And this more or less followed the pattern of previous years when you would meet with a negotiating committee with the Company for—

A. You mean the personnel that was there?

Q. That's right.

A. No. Mr. Arthur Hellender had not been there before.

Q. But otherwise—

A. But otherwise it was very similar.

Q. And how did the meeting commence?

A. I distributed the letter that you have entered in evidence here.

Q. That is General Counsel's Exhibit No. 8?

A. No, No. 8 is the letter that was sent to me. I distributed the letter which is marked Exhibit—Is this the exhibit number?

Q. Yes. This should be marked No. 8. This is the letter you distributed?

A. It was marked General Counsel's No. 8?

Q. Yes.

A. It was addressed, under the date of July 30, to Mr. Stumpf and to Mr. Ferber. I gave each of the gentlemen a signed copy of this letter.

MR. PLANT: By "each of the gentlemen," do you mean those two—

THE WITNESS: Mr. Stumpf and Mr. Ferber, each one a signed copy of the letter.

Q. (By Mr. Davis) And then what happened?

A. The letter was read and it was passed around amongst the Union committee, and after they had all read that, Mr. Stumpf then said that the committee was there for the purpose of negotiating a contract and wanted to know what counter-proposals management had to offer for the suggested modifications that the Union had sent in to us.

I informed Mr. Stumpf that it would be pointless for us to proceed with any suggested modifications of the current agreement since, as of midnight, July 31, 1959, the contract would have been terminated by its own language, as the Union had opened up the contract, and that as of that same time the Fluor Maintenance Corporation was taking over the maintenance work of the plant and, therefore, to negotiate any modifications of the agreement, that was being terminated by its own language at midnight, would be pointless.

Q. What did Mr. Stumpf say to that?

A. Mr. Stumpf did not agree with that. He contended that the contract was self-renewing, that it had one more year to run.



And I told him that it did not, in my opinion, that it by its own language ceased to exist as of July 31, 1959.

About that same time, if I recall correctly, Mr. Arca indicated concern about the shortness of time and also as to why we were contracting out maintenance work.

I informed Mr. Arca that I regretted the shortness of time but management had only arrived at the decision on the morning of July 27. And I promptly asked for a meeting with the Union representatives so as to give them a copy of the letter that was being sent to them, and to be in a position to discuss with them anything that they might wish to discuss at that time or give them more or additional information.

If the contract, I told Mr. Arca, had an August 31 anniversary date, or even later than that, I would be telling them as of this moment and would have been telling Mr. Stumpf and Mr. Ferber as of Monday night, July 27, what management's decision was.

I endeavored to explain to Mr. Arca or point out to Mr. Arca the problems that were attached and the reasons that we had contracted out the maintenance work. I endeavored, and I say "endeavored" because Mr. Arca was constantly interrupting, endeavored to recall to his mind and other members of the committee the years in the past when I pointed out, with the aid of charts, statistical information, just how expensive and how costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant.

I endeavored to call to Mr. Arca's and the committee's attention—

Q. Well, what did you say? Would you tell us what you said, please?

A. I beg your pardon?

Q. Would you tell us what you said rather than what you endeavored to say?

A. I said this—I am sorry, I am using the word "endeavor" because Mr. Arca was insisting upon shouting me down—I said that in 1958 I had recited to the committee, with the aid of charts, the problems that we were having on the Emeryville properties in the cost of operation, how other unions on that property had joined hands with management in an effort to bring about an economical and efficient operation, how we had not been able to attain that in our discussions with this particular Local.

I showed, with the aid of a chart, the returns that we were having over the past five years, in capital investments.

I informed Mr. Arca, when he repeated about there was such a short time, that if he was concerned about the shortness of time and the Union wished to defer what we were about to undertake, to please so state, give me their reasons for asking for the deferment, and I would give it active consideration.

I finally felt that it was necessary to ask Mr. Arca to withdraw his question as he was not giving me the proper opportunity to point out or give him answers to this question.

He withdrew his question and immediately Mr. Ferber asked almost the identical question that Mr. Arca had at the beginning. I again repeated to Mr. Ferber some of the things that I had told Mr. Arca about the problems we had in the plant as to why we were now contracting out maintenance work, that it would be more economical and more efficient, and this matter had been under consideration for quite a period of time.

Mr. Ferber commented about the shortness of time and I told him that if he and the boys felt that they would like to have this entire matter deferred, to so let me know and give me whatever reasons that they wished, for purposes of more discussions or personal reasons or whatever it was they wished, and we would take it under consideration.

Within a few moments after that, Mr. Arthur Hellender, the assistant to Mr. Robert Ash, said, "Do I understand, Mr. Thumann, that you are suggesting that this contract be extended for, say, a period of sixty days, and during that period of time you will negotiate a contract with 1304?"

I informed Mr. Hellender that that was not the case, that what I had said was that if the Union was concerned about the shortness of time, that July 31 was very close, that all they had to do was to ask for a deferment, give me the reasons and we would give it very active consideration.

No one replied to that matter whatsoever.

Q. Now, Mr. Thumann, did you ask them if they were asking you to negotiate a contract for the contractor with them?

A. Yes. At one period of time, when the Union spokesmen were insisting that something should be done about the proposals that they had submitted, and I was constantly repeating back that I felt it would be entirely pointless as the contract was expiring due to its own language as of July 31,

and that a contractor was coming in, I felt it was necessary to find out if they were endeavoring to have me negotiate an understanding with the contractor.

Q. The answer is yes to my question?

MR. PLANT: The answer is what the witness testified.

• • • • •

Q. (By Mr. Davis) Did you tell them in reply to the previous question that they asked that the contractor, so you had been informed, had contractual relations with all craft unions and therefore the power house and maintenance work would be performed by union men or men who would become members of various unions, as required by the various contracts?

A. Mr. Davis, you started out to read that and you said, "in reply to the previous question." What is the previous question?

Q. You asked them if they were asking you to negotiate a contract for the contractor with them, and the answer was yes.

A. That's right. At that stage of the game somebody inquired as to whether these were union people who were coming in to do the work, and the item you just read was the way I replied to it.

Q. And that is what you told them?

A. That's right.

Q. Now, were you asked at that time if you had contacted the various craft unions yourself?

A. Yes. Mr. Arca asked if I contacted the various craft unions myself, and my reply was that I had not, that I had gone up to the Building Trades Council on Tuesday morning because there I could encounter the various business agents that I had been trying to reach.

You must remember that it was Monday, late morning, when management made up its mind to contract out this maintenance work. I did my best to reach all of the concerned business agents in the afternoon, as I preferred to tell them as against their receiving a letter in the mails. I missed three or four, and as the Building Trades Council meets every Tuesday morning at the Central Labor Council Building I went up there and stood in front of their meeting room and as these various business agents came along I talked to them and told them what we were going to do.

Q. And you told them that Fluor was going to do the maintenance work?

A. Yes, I did.

Q. And you knew that Fluor would not employ any of the Steelworkers, members of the Steelworkers, did you not?

A. I did not know that.

Q. You knew they had contracts with other craft unions?

A. I knew that?

Q. Yes.

A. I had been told that.

Q. Yes. You were informed about that?

A. Yes.

Q. Did you know that the Steelworkers, were you informed that Steelworkers would not be employed?

A. I wasn't informed—

MR. PLANT: Just a moment. I think that counsel is confusing two questions and that tends to confuse the witness. One question is, who Fluor had contractual relations with, and the other question is, who Fluor would hire. They are two separate questions.

TRIAL EXAMINER: I think you ought to clear that up, Mr. Davis.

MR. DAVIS: I asked him if he knew Fluor would not hire any of the Steelworkers.

THE WITNESS: I did not know that.

TRIAL EXAMINER: You mean members of the Steelworkers Union?

MR. DAVIS: Right.

THE WITNESS: As a matter of fact, Mr. Davis, in this July 30 meeting I suggested to the Union that they ask the various people who were in our employ to contact the Fluor Maintenance Company in regard to jobs. I told them I had told the contractor that we have some very capable maintenance people in all crafts, and he told me and I reported to them in that meeting that he would be most happy to interview them and discuss employment with them.

Q. (By Mr. Davis) Did Stumpf offer to arbitrate whether management had the right to contract out the work?

A. He did.

Q. And what was your reply?

A. I replied that this contracting out we felt was our legal right and therefore to arbitrate something that was yours was just senseless and pointless.

Q. And didn't he ask for an extension of thirty days while you arbitrated this?

A. He did not.

Q. Did Stumpf ask you to modify the current labor agreement by adding a section that would state that the maintenance work under the jurisdiction of 1304 would be performed only by 1304 if management entered into an agreement with a contractor to do the maintenance work?

A. That's right; he did. He asked me if we would amend the contract right as of that moment. My reply to him was that that could not be done as we had entered into this contracting of maintenance work for economy and efficiency of operation, and for us to tie the contractor's hands in any fashion, shape or form would be senseless.

Q. Did you sign your name on an attendance sheet, Mr. Thumann?

A. I beg your pardon?

Q. At this July 30 meeting did you and the other member—people present sign your names on an attendance sheet?

A. That's right.

Q. I am showing you a document marked General Counsel's Exhibit No. 9 and I ask you if this is not the attendance sheet which you have just testified to which you and the other members present signed.

. . . . .

TRIAL EXAMINER: When you say "members," do you mean persons?

MR. DAVIS: Persons present signed.

A. That's right. This red marking down in here was not on it, and I don't recall this line going through, but the subject matter and the bracketing—

Q. (By Mr. Davis) Yes. And is this matter, this statement here, "These representatives of Fibreboard are not in attendance for contract negotiations but to restate their opinions that negotiations for a new contract would be pointless in view of management's intention to contract out power house and maintenance work,"—

A. Correct.

Q. And did you add that in your own handwriting?

A. That is my handwriting.

MR. DAVIS: I am offering General Counsel's Exhibit No. 9 in evidence.

TRIAL EXAMINER: Any objection?

MR. PLANT: No objection, except that the matter in red and the lines, which were added later, should not be determined part of the exhibit.

MR. DAVIS: Yes, Mr. Trial, the matter in red was added subsequently and should be excluded as part of the exhibit, and also the lines which separate the various items.

TRIAL EXAMINER: You mean the pencilled—

MR. DAVIS: The pencilled notation should be in there as part of the exhibit.

TRIAL EXAMINER: You mean the lines—

MR. DAVIS: The line and the bracket should be eliminated.

TRIAL EXAMINER: You mean where it says, "These representatives of Fibreboard are not in attendance . . ." and there are four names there, five names, those five names should be excluded?

MR. DAVIS: No, no. The pencilled notation is in Mr. Thumann's handwriting. That is part of the exhibit. The five names were signed, and all of the names are part of the exhibit. Just the bracket itself and the line and the red ink notation are not part of the exhibit.

• • • • •

Q. (By Mr. Davis) When did you agree with Fluor to contract out the work to them?

• • • • •

TRIAL EXAMINER: Was there an agreement entered into?

MR. PLANT: Yes, there was a written agreement executed.

• • • • •

Q. (By Mr. Davis) Prior to that, prior to the written agreement, there was an oral understanding, was there not?

• • • • •

THE WITNESS: I was informed on Monday morning, July 27, after the series of meetings that I also attended, that we were going to contract out the maintenance work. I had been pressing to get that information as quickly as I could be-



cause I wanted to notify all concerned unions as quickly as I could.

Q. (By Mr. Davis) Therefore you knew about it on July 27?

MR. PLANT: Just a moment. The witness did not testify to that. The question is misleading.

TRIAL EXAMINER: Read the question back, please.  
(Question read.)

TRIAL EXAMINER: Did you sit in on any conference about a certain oral agreement about contracting out the work?

THE WITNESS: No.

TRIAL EXAMINER: Well, just tell us what you know of your own knowledge.

THE WITNESS: Well, I was told—

TRIAL EXAMINER: Well, wait a minute, now. Don't tell us what somebody else told you.

THE WITNESS: Well, I know of my own knowledge.

TRIAL EXAMINER: Wait a minute; wait a minute.

Go ahead, Mr. Davis.

MR. DAVIS: All right. You can answer the question of the Trial Examiner.

THE WITNESS: I sat in on meetings beginning the first part of July in which there were discussions amongst management people having to do with the cost of operation and maintenance work in the Emeryville plant as against contracting—the costs, what the contracting costs would be. I sat in on meetings in which the Bechtel Corporation—

TRIAL EXAMINER: Which corporation?

THE WITNESS: Bechtel Corporation—in Mr. Wilson's office—Mr. Wilson is our purchasing agent and, as such, is the man who would handle and does handle all matters in which the Company makes purchases of anything, you might say—with the Bechtel people, Rosendahl, and one meeting in which a representative of the Fluor organization was there.

TRIAL EXAMINER: These meetings took place approximately when?

THE WITNESS: The meetings took place, I would say, with the three companies I mentioned, took place about the middle part, say beginning with the 14th of July, in that neighborhood, on.

TRIAL EXAMINER: The 14th up to somewhere around the 27th of July?

THE WITNESS: Correct.

Q. (By Mr. Davis) When were you informed that Fluor was chosen as the company who would be the contractor?

A. Tuesday morning.

Q. Who informed you?

MR. PLANT: Let's have the date on that.

THE WITNESS: Tuesday morning, July 28th.

Q. (By Mr. Davis) Who informed you?

A. Mr. Wilson.

Q. And when did he say Fluor would take over this work?

A. Midnight, July 31, 1959.

Q. Did you know that there were some Fluor people in the plant prior to July 31?

A. I did not.

TRIAL EXAMINER: You mean working?

MR. DAVIS: That's right.

Q. (By Mr. Davis) And did you know that there was a—that the Steelworkers put up a picket line at 6:00 p.m. on July 31?

A. That's right, they did.

Q. Did you know what the picket sign said?

A. Yes. It said, "Locked Out."

Q. Can you give me the rest of the phraseology on the picket sign?

A. Yes, I think I can. It said, "Locked Out," in large letters, and then in small letters underneath it, it said, substantially, that "Our Contract Has Another Year to Run," and underneath that was the insignia of the Union.

Q. Would you say that this language is correct, "Locked Out," on the first line; on the second line, "Our Contract Has One Year to Run"; and then underneath that "EBUM, Local 1304," and underneath that "U.S. of A., AFL-CIO"?

A. That's right.

Q. And "EBUM" stands for East Bay Union of Machinists?

A. I believe it does.

Q. And "U.S. of A." stands for United Steelworkers of America?

A. I believe it does.

Q. (By Mr. Davis) Now, in your survey of costs that you

mentioned, would there be any difference in costs with reference to the power house?

A. The costs were all one—

MR. PLANT: Just one moment. I will object to the question as unintelligible. The difference in costs between what and what?

TRIAL EXAMINER: I will sustain the objection.

Q. (By Mr. Davis) Well, you need the same number of men for the power house whether the Steelworkers continued to do that work or whether Fluor or any other contractor did that work, is that correct?

A. Not from my understanding. My understanding is that there would be fewer people assigned to the power house because it would be possible to service the power house from the maintenance people who would be working out in the plant in place of absolutely being stationed in the fire house as they had heretofore.

Q. With reference to the number of firemen and engineers, would there be any less?

A. No, not those two classifications.

Q. So, therefore, that being a 24-hour operation, the same number of firemen and engineers would be needed whether the Steelworkers or Fluor or any other contractor did that work, is that correct?

A. I am not a technician and I can't answer that question in terms of "is that correct."

Q. Well, you just testified that the same number of firemen and engineers would be needed.

TRIAL EXAMINER: Now, wait a minute. Before you contracted this work out, how many employees did you have there, and after you contracted it how many did the contractor have; is that what you mean?

MR. DAVIS: Well, it is another way of getting at it. I have no objection to the question.

A. The best answer I can give is what I gave before, Mr. Davis, and that is this. It is my understanding that it would be possible to take over and do some of the work that is necessary to be done—

TRIAL EXAMINER: Well, we don't care about that, we want to know what really happened.

THE WITNESS: Well, I can't answer that.

TRIAL EXAMINER: Don't you know how many people the contractor had working?

THE WITNESS: No, I do not.

Q. (By Mr. Davis) Now, with reference to the storekeeper, does the contractor still have a storekeeper in the supply house?

A. No, the contractor has not.

Q. Does not?

A. No. The storekeeping work presently is being performed by an hourly worker who works on the dock right adjacent to the storeroom, as I described earlier.

TRIAL EXAMINER: In whose employ is he?

THE WITNESS: In our employ, in Fibreboard's employ.

Q. (By Mr. Davis) And was the storekeeper who was doing the work previously—

A. The storekeeper was working half time in the storeroom and half time as a helper.

Q. And now you have who doing the work?

A. We have an hourly worker who is stationed on the dock right adjacent to the storeroom and one of our supervisors.

Q. Doing this work?

A. That's right. The hourly worker is doing the physical work, bringing in the supplies, putting them in bins, filling the requisitions, things of that sort, and the supervisor is assisting him in doing other types of work, such as sending cards up to the office for a re-order, and things of that sort.

Q. And this was formerly the duties of the storekeeper?

A. That's right.

TRIAL EXAMINER: Now, in whose employ is this supervisor?

THE WITNESS: Fibreboard's.

TRIAL EXAMINER: And the person under the supervisor's jurisdiction, in whose employ is he?

THE WITNESS: The hourly worker?

TRIAL EXAMINER: Yes.

THE WITNESS: Fibreboard's.

Q. (By Mr. Davis) Do you know what union the hourly worker belongs to?

A. Yes.

Q. What union does he belong to?

A. Local 6, ILWU.

Q. Now, subsequently Fibreboard entered into a contract with Fluor regarding the maintenance and power house work, is that correct?

MR. PLANT: Wait just a moment. I will object to the question as unintelligible. Subsequent to when?

MR. DAVIS: Subsequent to July 31 sometime.

TRIAL EXAMINER: Any objection?

A. Well, I was informed on the morning of July 28th by Mr. Ben Wilson, who is our purchasing agent, that the Fluor Maintenance people were the ones that were to do our maintenance and power house work.

Q. (By Mr. Davis) Was there a contract to that effect entered into between Fibreboard and Fluor?

A. That I don't know.

MR. DAVIS: May I have a copy of the contract for the record?

MR. PLANT: I can offer a stipulation on this, if you wish. I will give you a copy of the contract. As to when it was executed, I will offer you the following stipulation, if you wish it. That contract was drafted by the lawyers in consultation with the clients on July 31. A draft of it—the draft was sent to Fluor—

TRIAL EXAMINER: By whom?

MR. PLANT: By Fibreboard or—No. Then on Monday Fibreboard made certain changes in the draft. That was Monday, the 3rd. And on the 4th they signed it, Fibreboard signed it and sent it to Fluor, and Fibreboard got it back from Fluor with Fluor's signature on it on about August 11, I believe. Fibreboard signed it on August 4. The first draft was sent to Fluor, I believe, on July 31.

TRIAL EXAMINER: By whom?

MR. PLANT: By Fibreboard. And the covering letter stated that they were authorized to start work Monday morning in accordance with the tentative understanding which had been reached. I can produce that correspondence for you, Mr. Davis, if you wish it. I don't have it here at the moment.

MR. DAVIS: Well, the point is the contract is dated August 1, 1959.

MR. PLANT: The contract was effective as of August 1, 1959, and before that date—it was signed by Fibreboard on August 4 and was signed by Fluor on some date subsequent to August 4. The exact date I don't know. I know when it was returned to us.

MR. DAVIS: If you say so, Mr. Plant, I have no reason to doubt what you say.

MR. PLANT: The only thing is, Mr. Thumann doesn't know about it. We have another witness that does.

MR. DAVIS: In other words, what you say, I don't doubt what you say, but I do want to call to your attention that the contract says, "IN WITNESS WHEREOF, the parties have executed this agreement as of the 1st day of August, 1959."

MR. PLANT: That is right, as of the 1st day of August.

MR. DAVIS: And I am offering this agreement as General Counsel's Exhibit No. 10.

TRIAL EXAMINER: Any objection?

MR. PLANT: None.

TRIAL EXAMINER: There being no objection, the document is received in evidence, and I will ask the Reporter to kindly mark it as General Counsel's Exhibit No. 10, and a photostat or other copy may be introduced instead of the original.

MR. DAVIS: Before I ask the witness to resume the stand, I am wondering if Mr. Plant would stipulate with respect to these two documents.

MR. PLANT: I will stipulate to those.

MR. DAVIS: The fact that the document which is General Counsel's Exhibit No. 11 was distributed to all employees in the plant?

MR. PLANT: Yes, it was distributed to all the employees in the plant.

TRIAL EXAMINER: When?

MR. PLANT: On July 30, the date it bears.

MR. DAVIS: And the document which is General Counsel's Exhibit No. 12 was distributed just to the members of the Steelworkers?

MR. PLANT: No, that was distributed to all employees being terminated, which included employees represented by four other unions.

MR. DAVIS: I see. In other words, all employees of the maintenance and power house and the storekeeper?

MR. PLANT: Yes.

THE WITNESS: Yes.

MR. PLANT: Is that stipulation accepted?

MR. DAVIS: I accept it.



MR. DAVIS: General Counsel's Exhibit No. 12 was distributed on July 31, is that correct?

MR. PLANT: Are you asking for the testimony of the witness or the stipulation from me?

MR. DAVIS: I'm asking you.

MR. PLANT: That was distributed on its date to employees who were being terminated.

TRIAL EXAMINER: And who were terminated?

MR. PLANT: The employees who had been theretofore employed in maintenance and power house work, generally speaking, including employees represented by all of the five unions that I have mentioned as representing maintenance employees.

TRIAL EXAMINER: And who were terminated on July 31, 1959?

MR. PLANT: Right.

MR. DAVIS: Which included all of the employees represented by the Steelworkers?

MR. PLANT: Yes. They were terminated at the end of that day.

. . . . .

Q. (By Mr. Davis) Now, you testified, Mr. Thumann, that on July 30 you told Mr. Stumpf and other people present that you knew that Fluor had a contract with other craft unions, is that correct?

. . . . .

A. In answer to a question as to whether the men who were going to do the maintenance work were union men or not, I said yes, they were, because I had been informed that the Fluor Maintenance Company had contracts, negotiated agreements with other unions.

Q. (By Mr. Davis) Yes. And when did you acquire that information?

A. When did I?

Q. Yes.

A. I would say that it was, oh, around the 21st of July, somewhere in that neighborhood, 22nd.

TRIAL EXAMINER: Of this year?

THE WITNESS: Of this year.

Q. (By Mr. Davis) Did you also know that Fluor did not have a contract with Steelworkers?

A. I did not.

Q. Did you learn it subsequently?

MR. PLANT: Subsequent to when?

MR. DAVIS: To July 21.

A. No, I did not.

TRIAL EXAMINER: Do you know it now?

THE WITNESS: I know it now.

Q. (By Mr. Davis) When did you find it out?

A. I found it out when—I would say the earliest would be about the 30th of July when we were holding the meeting in the conference room when I suggested that the employees would contact the Fluor Maintenance Company in regards to work and that I had recommended them to these people, and at that time I don't know whether Mr. Stumpf or Mr. Ferber, but one of the gentlemen commented to the end that it was—that these jobs were Local 1304's jobs and that they did not have any contract with the Fluor Maintenance people.

TRIAL EXAMINER: That is that 1304 did not have a contract?

THE WITNESS: Did not have a contract, you are right.

TRIAL EXAMINER: Mr. Darwin, have you any questions to ask this witness?

MR. DARWIN: Yes, I do.

TRIAL EXAMINER: You may proceed, sir.

Q. (By Mr. Darwin) Has Mr. Robert Ash ever negotiated in behalf of Local 1304 with you and your Company?

MR. PLANT: Objected to as calling for a conclusion of the witness.

TRIAL EXAMINER: I beg your pardon?

MR. PLANT: Objected to as calling for a conclusion of the witness. The witness has already testified as to a meeting which Mr. Ash attended in which he made a certain proposal. Now, whether or not you want to characterize that as negotiating on behalf of 1304, I don't know. It is a characterization and calls for a conclusion of the witness.

TRIAL EXAMINER: I'll sustain the objection.

Q. (By Mr. Darwin) I think you did say that Mr. Ash said that members of Local 1304 should be put back to work first before any further discussions were had. Do you remember that testimony?

A. Mr. Ash said at the outset of the meeting in Mayor Lacoste's office—Is that what you are referring to?

Q. That's right.

A. —at the outset of the meeting that he had asked for the meeting to be held and that he had a proposal to make, and the proposal was, put the 1304 boys back to work, the picket line will be removed, and then the entire issue can be resolved through the NLRB or the courts.

Q. Did you also hear Mr. Ash say to you and to the Mayor that that was the position of the Regional Office of the National Labor Relations Board; did he say that?

A. The publicity director of the Steelworkers Union, after the meeting had been under way for, I would say, a good half hour, said that an order had been issued by the Regional Board that we were to put all 1304 people back to work immediately and sit down and negotiate.

TRIAL EXAMINER: When you say "Regional Board," what do you mean?

THE WITNESS: The Tenth Region.

MR. DAVIS: Twentieth Region.

THE WITNESS: Or whatever region this is.

TRIAL EXAMINER: You mean the Twentieth Region of the National Labor Relations Board?

THE WITNESS: Yes, I assume that is what he meant.

Q. (By Mr. Darwin) And following that did Mayor Lacoste pick up the phone and call to me; you know that, do you?

A. Yes. Shortly thereafter the Mayor picked up the phone and talked to you.

Q. And I don't know whether you heard the conversation between the Mayor and me, but did the Mayor then report to you that I had said that it was the position of the Labor Board here that these men be put back and that it was not in an official written order; did he tell you that?

A. No, he did not.

Q. Did you know that?

A. I asked to speak with you so as to find out what you were talking about, and you refused to talk with me over the telephone.

TRIAL EXAMINER: You mean someone told you that Mr. Darwin refused to talk to you?

THE WITNESS: That's right.

TRIAL EXAMINER: Who was that person?

THE WITNESS: That was the publicity director of the Steelworkers Union. In fact, he quoted Mr. Darwin as saying that I should talk to my own counsel.

Q. Was the purpose of that meeting called by the Mayor and Sergeant Steeves of the Emeryville Police to try to persuade you to get the picket line off?

A. No. The Mayor phoned me the day before the meeting and he said that he had been requested by Mr. Ash to hold a meeting in his office for the purpose of seeing what we could do about the problem we had there in Emeryville.

Q. Mr. Stumpf wasn't there?

A. No.

Q. Mr. Ferber, the business manager of Local 1304, was not there?

A. They were not in the office.

Q. The five or six employees of Fibreboard that generally constitute the negotiating team, along with these two I have just mentioned, were not there, is that correct?

A. That's right.

TRIAL EXAMINER: You mean were not there at the August 21 meeting?

MR. DARWIN: Meeting, that is correct.

TRIAL EXAMINER: Who was there, Ash and this—

THE WITNESS: Publicity director of the Steelworkers Union and Mr. Robert Smith, who was president of Local 1304.

TRIAL EXAMINER: And they are the ones that represented the Union?

THE WITNESS: That's right.

TRIAL EXAMINER: Or unions.

Q. (By Mr. Darwin) Was Mr. Robert Smith an employee of Fibreboard?

A. No.

Q. Do you know it of your own knowledge that he has not been an employee of Fibreboard for about thirteen years?

A. I don't know.

Q. You have been with the Company how long, sir?

A. Since 1949.

Q. Has Robert Smith been an employee since 1949 of the Respondent?

A. Not to my knowledge. I don't know all the employees.

### CROSS-EXAMINATION

Q. (By Mr. Plant) Mr. Thumann, would you give us a brief history of Fibreboard Paper Products Corporation's corporate existence? By what names was it previously known?

A. It was known as the Paraffin Companies, and then later changed its name to Pabco Products, Inc., and then later it changed its name to Fibreboard Paper Products Corporation, after it took over the Fibreboard Products, Inc.

Q. Now, you have described the operations of the plant at Emeryville. Does the corporation have plants elsewhere?

A. They have.

Q. A large number of those plants were acquired, were they, in Fibreboard's merger, the Fibreboard-Pabco merger?

A. That's right.

Q. And when did that merger take place?

A. In 1956, as I recall.

Q. Will you state what other plants the corporation has besides the one in Emeryville?

A. It has a plant up in Port Angeles, Washington; Sumner, Washington; two plants in Portland, Oregon; a plant in Stockton; two plants in—really three plants in the Antioch area of Contra Costa County, California; a plant in San Francisco; a plant in Redwood City, California; a plant in Newark, Alameda County, California; two plants in Southgate, California; one plant in Vernon, California; one plant in Wilmington, California; a plant in Denver, Colorado; a plant in Florence, Colorado; gypsum quarries at Coaldale, Colorado; and a plant in Henderson, Nevada. It has its head offices here in San Francisco.

Q. Now, are you charged with responsibility for the industrial relations of all of these plants that you have mentioned?

A. Of those plants plus the subsidiaries.

Q. And are there subsidiaries?

A. There are.

TRIAL EXAMINER: Well, these plants that you just enumerated, are they wholly owned and operated by Fibreboard or are they subsidiaries?

THE WITNESS: No, they are owned and operated by Fibreboard.

TRIAL EXAMINER: And besides these plants, Fibreboard has subsidiaries?

THE WITNESS: Subsidiaries, that is right.

TRIAL EXAMINER: Are they wholly owned or otherwise?

THE WITNESS: They are wholly owned.

Q. (By Mr. Plant) Now, will you state whether or not there are union contracts at all of these plants that you have mentioned?

A. That's right.

Q. That is, that there are?

A. Say that again?

Q. Your answer is that there are union contracts at all of these plants?

A. There are union contracts at all of these plants.

Q. Now, turning your attention to the Emeryville plant, I believe you have enumerated the number of production employees. Are those employees represented by unions?

A. They are.

Q. What unions represent them?

A. There is the Oilworkers Union, Printing Specialties Union, Pulp and Sulfide Workers Union, Local 6, ILWU, Paint-makers Union, Sheet Metal Workers Union, Teamsters Union.

Q. How about the Chemists?

A. And the Associated Chemists.

Q. Now, does Fibreboard have collective bargaining contracts with all of those unions?

A. Right.

Q. Prior to July 31 of this year, what unions were involved in your maintenance and power house setup?

A. There was Local 1304, East Bay Union of Machinists, Steamfitters Union, the Ironworkers Union, the Carpenters Union, Electricians Union.

Q. And did you have collective bargaining contracts with all of those unions?

A. We did.

Q. Were those contractual relationships that you have mentioned with these various unions of recent origin or had you had contracts for some time?

A. For some time.

Q. For some time. Do you mean years?

A. Yes, that's right, approximately 1937.

Q. How long had Fibreboard had contractual relationships with the Machinists Union, Local 1304?

A. Approximately 1937.



Q. Now, you have mentioned that consideration had been given for some time to contracting out the maintenance work. Why was that, why did the Company give consideration to that?

A. The cost of doing our own maintenance work was excessive when it was compared with the cost of maintenance work in our various plants, as well as in examining the costs of our competitors.

Q. Had you in past years discussed with any of the unions representing the maintenance employees the facts that you have just mentioned?

A. I had discussed it with all of them.

Q. Did you, for example, discuss it with the Machinists Union, Local 1304, in 1937?

A. In 1937, I was not there.

Q. Pardon me. 1957. I am twenty years off.

A. I did.

Q. By the way, when was your first meeting, your first contract negotiating meeting with Local 1304 in 1957?

A. July 23.

Q. And you discussed the matter with them in 1958?

A. I did.

Q. And when was your first meeting that year?

A. July 10.

Q. Did you exhibit to these various unions representing maintenance employees charts showing your cost situation?

A. I did. I exhibited in 1957 as well as in prior years charts that were made up showing the relative worth of the major cost items of the contract that 1304 had with the Emeryville plant, and the same cost items as 1304 had with other contracts that it had in that area. I showed to them the costs, as far as Machinists' rates of pay were in our competitors' plants.

Q. Did you go into similar figures with the other unions representing maintenance employees?

A. Yes.

Q. During those years did you discuss with the unions representing production and maintenance employees at the Emeryville plant the possibility that economics might force a closure of the plant or of some part thereof?

A. I did.

Q. Was that a matter which was mentioned only once or was it a matter which you discussed with them frequently?

A. Beginning with approximately 1956, '57, and certainly in full force in 1958, I pointed out that the cost problem of the Emeryville plant was a very heavy one and that management was doing everything it possibly could to bring about an economical operation and restore the plant properties into a profitable position.

In 1958 I pointed out to the Union that I was then working with other unions to bring about changes in their contracts, changes in procedures and other things that would assist in bringing down the cost operation of the entire plant.

Q. Did Local 1304 in either 1957 or 1958, after you pointed these things out to them, make any proposition calculated to help the situation?

A. They did not.

MR. DARWIN: I object to that as calling for a conclusion of the witness. He has been leading the witness to a great extent, and I want to interrupt at this time.

TRIAL EXAMINER: I will sustain the objection.

Will you reframe your question, Mr. Plant, please?

Q. (By Mr. Plant) Were there demands for wage increases or other—or increased benefits in 1957 by the Machinists Union?

A. There was.

Q. Did the negotiations end up with those demands or a part thereof being acceded to by Fibreboard?

A. Yes.

Q. (By Mr. Plant) And what was the fact in that connection in 1958?

A. The same thing.

Q. When, to the best of your knowledge, did Fibreboard first go into the possibility, consider the possibility of contracting out this work?

A. In 1956.

Q. Will you state what occurred at that time; what was done?

A. Yes. A study had been made which demonstrated that contracting out maintenance work should be given serious consideration, but we were in the process of merging, reorganizing, allocating, if I can put it this way, responsibility amongst our various executives, and the problems attendant to that were so tremendous that it was decided that we should forego making an effort to contract out the maintenance work.

Q. At that time?

A. At that time.

Q. Now, did you at any time during the month of June of this year speak about the matter to a Mr. Burgess?

A. I did.

Q. Who is Mr. Burgess?

A. Mr. Burgess is vice-president in charge of manufacturing.

Q. How long has he held that position?

A. He was given the responsibility of that work about January 1 of this year. He was made a vice-president in charge of manufacturing in April.

Q. And about when was it that you spoke to him about the matter of contracts?

• • • • •

A. In the latter part of June.

Q. (By Mr. Plant) Will you state the substance of your conversation with Mr. Burgess, that is, the substance of what you said and the substance of what he said?

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A. (Continuing) I asked Mr. Burgess as to what management's intentions were with regard to maintenance work in the plant as I needed to know so I would know what to do in regard to my relationships with the various craft unions in the Emeryville plant.

Q. (By Mr. Plant) What was his reply?

A. He asked me to enlarge upon my question. I did; I informed him as to the background of why I asked him that question and he told me that he would certainly give it immediate consideration and would let me know within a reasonable length of time.

Q. Now, did you thereafter participate in a review of the matter of the possibility of contracting out the work with Mr. Burgess or with others?

A. My participation was to the extent of being kept informed. I attended meetings of the various staff people at headquarters who were charged with the responsibility of arriving at a determination to develop how the work would be handled. I sat in on meetings in which—which were held with the Bechtel Corporation, with the Rosendahl Corporation, and with the Fluor Corporation, and also in top management meet-

ings where the determinations were being made after all this information had been collected.

Q. In connection with that review of the matter, do you know if any study was made of your own maintenance costs?

A. Yes.

Q. Now, were you present at the meeting at which the decision was made that the work should be contracted out?

A. I was.

Q. And when did that meeting take place?

A. The morning of July 27, Monday.

Q. Now, at that time had there been any narrowing down of the number of contractors that were under consideration?

A. Yes, there had been.

Q. Who were still under consideration at that time?

A. The Rosendahl and the Fluor Maintenance Corporation.

Q. And when did you learn that the Fluor Corporation had been definitely decided upon?

A. Tuesday morning, July 28.

Q. Now, you have testified in substance that you told Mr. Ferber sometime in late June that you would call him sometime during the week of July 12 regarding a meeting, and you have testified that you did not call him.

A. That's right.

Q. Will you state why you did not call him?

A. Yes. I did not call him as I was endeavoring to bring about a conclusion of management as to what it intended to do about maintenance work, whether to contract it out or not.

Q. How would that affect the question of your calling him about a meeting?

A. To have called him to set up a meeting when I did not know what chart or what course to follow I felt would be a wrong thing to do. I felt that I should be in a position, when I established a meeting with Mr. Ferber and Mr. Stumpf and the committee, to discuss either modification of the contract or to announce that we were going to contract out maintenance work.

Q. Now, you have testified regarding a meeting with Mr. Ferber and Mr. Stumpf on July 27 at Pland's Restaurant.

A. Right.

Q. And you have also testified to telling them about what you proposed to do with respect to termination allowances.

A. I did.

Q. Did either of them make any comment, suggestion or proposal upon the subject of termination allowances?

A. No, they did not.

Q. At that meeting did either of them make any question of any kind or proposal of any kind regarding your instructing the contractor as to who the contractor might hire?

A. Yes. They asked me to tell the contractor that 1304 had been doing the work and that 1304 people should do the work.

My reply to that was that I could not do it as we had entered into a contract with the contractor, whose hands we felt we should not tie and who we would hold responsible for performance of the work.

Q. Now, was it at that time that you said you had entered into a contract with a contractor?

A. That we were entering into a contract with the contractor. We had not selected—I mentioned the fact that there were two that were being given consideration.

Q. Now, calling your attention to the meeting of July 30 with the representatives of the Union, during that meeting did you make any mention of the question of termination pay?

A. I did.

Q. And what did you say about it?

A. I said that termination pay of that, up and above what the contract required, to be paid to people would be made, that we would give pro rata vacation, we would give termination pay that would be based upon, from five to ten years, four weeks as a total; from ten to fifteen years, five weeks as a total; from fifteen to twenty years, six weeks as a total; and over twenty years, seven weeks as a total. And also each employee would be given what we called, I believe, a personal statement form that would show on it just exactly what each man was to receive in terms of prorated vacation, in terms of their severance pay, and it would also list what he would have in terms of pension rights, whether he would have normal retirement, vested interest or optional early retirement.

Q. Now, did any of the Union people present at that meeting or make any comment or proposal with respect to the question of termination allowances?

A. They did not.

Q. At the conclusion of that meeting of July 30, was any statement made by any of the people there about willingness to meet further upon request?

A. Yes. Mr. Stumpf announced that the Union was ready to meet with management again at any time that management desired a meeting.

I announced that management would be most happy to meet at any time for any meeting to answer any questions or to discuss any matter the Union wished to discuss.

Q. Now, did you receive thereafter any request by the Union for any further meeting?

A. Nothing from Local 1304.

Q. The only request that you received was the one transmitted to you through the Mayor, is that right?

A. Right.

Q. I think that you have mentioned a proposal made, first, that you would instruct the contractor to employ 1304 people and then later in the meeting of July 30 a proposal to the effect that your contract be amended to prohibit contracting, except to contractors employing 1304 people, and you mentioned a proposal made regarding arbitration, and you have mentioned a proposal that the Company renew the contract with 1304 with the modifications which have been proposed. Did 1304 or any of these union people at any time make any proposals other than those that you have mentioned?

A. No, they did not.

TRIAL EXAMINER: Did they indicate that they would withdraw the proposals?

THE WITNESS: Would you say that again, sir?

TRIAL EXAMINER: Did they indicate to you that they would withdraw the proposals?

THE WITNESS: That they would withdraw the proposals?

TRIAL EXAMINER: Yes.

THE WITNESS: No, they did not.

Q. (By Mr. Plant) Did the Union ever ask that you defer the matter of contracting out the work to give the Union more time to consider the problem?

A. They did not.

TRIAL EXAMINER: What was that last question? (Question read.)

TRIAL EXAMINER: Did they ask to arbitrate it?

THE WITNESS: Yes, they did, they asked to arbitrate it.

TRIAL EXAMINER: And what was to be done while the arbitration proceedings were going on, did they indicate?



THE WITNESS: Not to my knowledge. The question was put to me, would we be willing to arbitrate our right to contract out maintenance work.

TRIAL EXAMINER: In the meantime let their members work for your Company?

THE WITNESS: Nothing was said along those lines. I was asked the question and I gave that answer to that question.

Q. (By Mr. Plant) In other words, in making the proposal regarding arbitration, the Union representatives did not specify who would do the work in the meantime?

A. No, that's right.

Q. Well, it was understood, wasn't it, that you weren't to sublet this work until the arbitration proceedings were over?

A. I gave no thought as to what would take place there. I tried to answer the question about arbitrating our right to contract out maintenance work, and I replied that we would not arbitrate anything that was our legal right to do.

TRIAL EXAMINER: Yes. But it follows that if, when they asked you to arbitrate it, they meant before you did contract it out that you would go through the arbitration proceedings, isn't that right?

THE WITNESS: Well—

TRIAL EXAMINER: Well, they are not going to let somebody—

THE WITNESS: Do you want me to give an assumption or do you want me to—

TRIAL EXAMINER: Well, doesn't it stand to reason, from your experience in this labor relations field, that when they said let's arbitrate it they meant let the thing stand?

THE WITNESS: If they would arbitrate it under the grievance procedure, you would be right in what you assumed.

TRIAL EXAMINER: And they meant to let things stand until the arbitration proceedings were over—

THE WITNESS: Well, very frankly, if that was something that we would be willing or could arbitrate I would have, of necessity, had to find out about the contract that was to become effective as of July 31 and a few other things.

TRIAL EXAMINER: Well, there is no use going through arbitration proceedings if the work was all completed by the contractor.

THE WITNESS: Your assumption, I think, is right.

Q. (By Mr. Plant) Now, let's discuss briefly this matter of the storekeeper. Was that a fulltime job prior to July 31?

A. It was not.

Q. What did the man who did that work, what else did he do?

A. He worked as a helper.

Q. And about how much of his time did he spend as a helper and how much of his time did he—

A. I understand it was about evenly divided.

TRIAL EXAMINER: Did his rate of pay change at any time?

THE WITNESS: No, it did not.

Q. (By Mr. Plant) Now, did you also have in the area of that storeroom, or whatever you call it, another employee who handled incoming shipments?

A. Yes. We had an hourly worker who received the incoming shipments and turned them over to the storekeeper.

Q. And that hourly worker was in the unit represented by the ILWU, is that right?

A. You are right.

Q. Now, did that receiving clerk or whatever you may call him have enough work to keep him busy?

A. No.

Q. Now, since July 31 it is this receiving clerk that you have mentioned who has done part of the work that was formerly done by the storekeeper, is that correct?

A. That is correct.

Q. And the other part, the part of handing in orders to the office, has been done by a supervisor?

A. Right.

Q. You have not added any employee to do the store-keeping work?

A. We have not.

### REDIRECT EXAMINATION

Q. (By Mr. Davis) You have testified, Mr. Thumann, that in previous years, in 1957 and 1958, you talked about excessive costs and you showed the Union representatives these charts, is that correct?

A. Right.

Q. That was during a negotiating meeting, wasn't it?

A. During negotiations, yes.

Q. That was for the purpose of trying to keep their demands down, wasn't it?

A. It was for the purpose of trying to make certain that our contract would not become too excessive.

Q. That's right.

A. And that we could adjust things.

Q. So therefore you were trying to keep their demands down, isn't that so, tried to arrive at a lower wage scale than they were asking for?

A. Trying to work out a wage scale that management could live with.

Q. Now, in the July 30 meeting, isn't it a fact that Mr. Hellender asked you if you would be willing to extend the termination date for, say, two months and during that period negotiate an agreement with Local 1304 for the coming year?

A. Mr. Hellender asked me if I had been suggesting a contract extension for, say, about sixty days and during that period of time to negotiate a new agreement with 1304.

Q. (By Mr. Davis) He didn't ask you if you would be willing to make such—

A. No. He asked me if I was saying that.

Q. Well, do you remember making a memorandum concerning additional facts concerning the East Bay Union of Machinists? Do you remember this?

I show you a document and ask you if that is not the memorandum you prepared or that was prepared under your direction.

A. Yes.

MR. DAVIS: The memorandum says that within a few minutes after these comments to Ferber, Arthur Hellender, an assistant to Bob Ash, secretary of the Labor Council of Alameda County, asked me if I was saying that I would be willing to extend the termination date for, say, two months and during that period negotiate an agreement with Local 1304 for the coming year.

Q. (By Mr. Davis) Is that a correct statement?

A. That's right.

Q. Okay. Now, during your August 21 meeting in the Mayor's office, wasn't Bob Ash's proposal that the men go back to work and that you arbitrate or have the courts decide these questions?

A. Mr. Ash's proposal was that 1304 men be restored to their jobs, the picket line would be removed, and then the matter thus could be resolved by the NLRB or the court.

Q. Okay. Did you offer at any time to negotiate with the Union the termination pay, vacation pay?

A. I announced first on the evening of July 27 what management was prepared to do up and above the contractual requirements.

In the meeting of July 30 I again made the same announcement that management was willing to do this up and above the contractual requirements of the contract.

Q. Did you ask them for any proposals on this—

A. I did not.

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TRIAL EXAMINER: Did you say that you would meet with them?

THE WITNESS: I said I would meet with them for any discussion or questions or anything else that they wished to have.

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Q. (By Mr. Davis) Did you say that you would meet with them to discuss these questions?

A. I said I would meet with them to discuss anything that they wished to discuss.

Q. And you say you said that on July 27th, you said you told them that on July 27th?

A. On the night of July 27 I talked with Mr. Stumpf and Mr. Ferber and I told those men about what we were going to do in terms of termination pay. In the course of that discussion Mr. Ferber asked for a meeting to be held. Tentatively we set Thursday, July 30, as the date on which we would hold the meeting.

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#### REDIRECT EXAMINATION (Resumed)

Q. (By Mr. Darwin) Now, Mr. Thumam, these charts of economic data which you say were exhibited from year to

year to Local 1304 in negotiating sessions were similar types of charts that you had exhibited in your negotiations with other unions, isn't that correct?

A. Similar in type, but not, of course, the same subject matter.

Q. Very well. And some of the unions in your negotiation sessions from year to year where you had charts, economic charts, and whatever other data, included such unions as the Printing Specialties Union, isn't that correct?

A. No. The Printing Specialties, as I recall, in former years, would be a case of where I would discuss the relative costs—during negotiations I am talking about now—I would discuss the cost values with the union and make whatever comparisons were fitting at that particular time.

Q. And you might use charts and other—

A. Cost-of-living data, yes, whatever was considered suitable.

Q. And without burdening you any further, that would be generally true as to all other unions with whom you had to meet from time to time?

A. That's right.

MR. DARWIN: That's all.

TRIAL EXAMINER: Any questions, Mr. Davis?

MR. DAVIS: Yes, I have just one question.

Q. (By Mr. Davis) I show you a document which has been marked General Counsel's Exhibit No. 13 and ask you what it is.

A. This is known as a "Personal Statement for Mr.——" and then the name of the employee was filled in, and this was handed to him on July 31, 1959.

Q. I see. And those were given to those employees who were discharged on that day?

A. Who were terminated on that day.

Q. (By Mr. Davis) I show you General Counsel's Exhibit No. 11, and it has been stipulated that this was passed out to all the Emeryville employees on July 30, and ask you in what manner it was distributed to all the employees.

A. It was distributed to the various department and supervisory employees.

Q. Exactly how?

A. I can't give you the mechanics of it. I know what the procedure was.

Q. What time of the day, in the morning or afternoon?

A. That I can't answer.

Q. But sometime during the day when the people reported for work?

A. It was sometime during the day, that's right.

TRIAL EXAMINER: You are excused. Thank you very kindly.

(Witness excused.)

### CARL JONES

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: What is your name, sir?

THE WITNESS: Carl Jones.

TRIAL EXAMINER: Where do you live, Mr. Jones?

THE WITNESS: I live in San Bruno, 217 Santo Domingo Avenue.

### DIRECT EXAMINATION

Q. (By Mr. McFetridge) Please state your occupation.

A. Staff representative with the International Union of United Steelworkers.

Q. As the staff representative were you called to attend any meetings during the month of August concerning the strike at Fibreboard Corporation?

A. I wasn't called to meet with the Company, I was called to a meeting by Mr. Angelo and asked to represent the United Steelworkers and myself at a meeting with the Mayor of Emeryville.

Q. On what date was that, Mr. Jones?

A. On the 21st of August.

TRIAL EXAMINER: And who is Mr. Angelo?

THE WITNESS: Mr. Angelo is the sub-district director assigned to this area.

TRIAL EXAMINER: Is he a Steelworker?



THE WITNESS: Yes.

TRIAL EXAMINER: What is his first name?

THE WITNESS: Joseph.

Q. (By Mr. McFetridge) Would Mr. Angelo be considered your boss?

A. Yes.

Q. And who else was present at this meeting?

A. Well, there were several people that I didn't know. There was Bob Ash, representing the Central Labor Council, and Bob Smith came into the meeting from the United Steelworkers, 1304, and there were representatives of the Company, I don't recall the names, and Mr. Thumann was there.

Q. I should have asked you this question before. As the staff representative have you negotiated contracts with various companies in the past?

A. Yes. I negotiate contracts with companies that I am assigned to negotiate with. In this particular instance I was instructed not to negotiate. There was no negotiation, it was merely a public relations matter with the Mayor. The Mayor had requested the meeting and we attended for the purpose of explaining to him what had happened.

TRIAL EXAMINER: You said you got instructions. From whom?

THE WITNESS: Mr. Angelo, that we were only there for the purpose of seeing that our information got over to the Mayor, but not for the purposes of negotiations.

Q. (By Mr. McFetridge) And what was your information?

A. Our information in this particular instance was that the Board was recommending that they return the Steelworkers to their jobs and negotiate with the Union.

Q. (By Mr. McFetridge) What did you tell the other persons present at this meeting?

A. Well, I opened for the Steelworkers, stating that I was there representing the Steelworkers, not for the purpose of negotiations but merely in the public interest at the request of a representative of the City of Emeryville, a public official of the City of Emeryville; that it was my understanding that the Board had recommended that the Steelworkers be returned to their jobs and that the Pabco Company negotiate with them, that that was all we were interested in, they return the men

to the job, and if they wanted to negotiate they would negotiate with the proper authorities.

Q. Did you say that you were directed to say this by Mr. Angelo, your superior?

A. Yes.

Q. Had you ever yourself been part of a negotiating committee in negotiating a contract with Fibreboard?

A. I had not.

Q. You have not. Did anything else take place at the meeting in regard to conversations that you had with the representatives who were present?

A. Mr. Thumann denied that the Board was making such a recommendation and I, just before the conclusion of the meeting, phoned the attorney for the Union, Mr. Darwin, and asked him to repeat to the Mayor, if he would, and he agreed that he would; I asked him if he would tell Mr. Thumann, and he said that he would not, that Mr. Thumann had attorneys and he wasn't supposed to instruct Mr. Thumann, and that it was up to his attorneys to instruct him at the time they thought proper to inform him, if they had not already informed him.

#### LLOYD H. FERBER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: What is your name, sir?

THE WITNESS: Lloyd H. Ferber.

TRIAL EXAMINER: Where do you live, sir?

THE WITNESS: 3200 Rheem Avenue, Richmond, California.

TRIAL EXAMINER: You may be seated, sir.

The General Counsel may proceed with the examination of this witness, who has been duly sworn.

#### DIRECT EXAMINATION

Q. (By Mr. Davis) Mr. Ferber, what is your position?

A. I am the Business Representative of the East Bay Union of Machinists, Local 1304, United Steelworkers of America.

Q. And how long have you held that position?

A. Since July of 1952.

Q. And since that time have you been one of the parties that has been engaged in the negotiations with Pabco or Fibre-board?

A. Since 1953, yes.

Q. When did you next have contact with Mr. Thumann?

A. I next had contact with Mr. Thumann on July 27. Mr. Stumpf, Mr. Arca and myself were at Gulf Controls to negotiate—in negotiations, and Mr. Stumpf proceeded to call from his office to Mr. Thumann.

We concluded negotiations at approximately 5:15 to 5:30 and took Mr. Arca back to the Union Hall to pick up his car. And I had been feeling rather ill all day, so I asked Mr. Stumpf if he would drive me over to Permanente Hospital. And on the way to Permanente Mr. Stumpf informed me that he had talked to Mr. Thumann on the phone and that Mr. Thumann would like to meet us at Pland's, that he had something very important to tell us. So I decided that possibly we should go over, even though I wasn't feeling too well. And we went over to Pland's, arrived there at approximately a little after 6:00, possibly, 6:15, and parked our car, went in the door of Pland's Restaurant and didn't see Mr. Thumann. We came back outside. And when I next saw Mr. Thumann he had come from the inside of the restaurant, and I saw him in front of Pland's Restaurant.

Q. And will you tell us what happened there and what was said?

A. Well, after some general exchange we went into the cocktail—restaurant part of the cocktail—diningroom part of the restaurant and took a table adjacent to the bar. And there was a drink ordered. And after it had been delivered, Mr. Thumann stated that, "I have some news that I think will shock you." And he proceeded to tell us that Pabco for some time had been studying the possibility of contracting out maintenance work and on only that day arrived at a decision to do so, and that on July 31 Pabco would have no 1304 employees.

I asked at that time, "Does this include the power house?" And he answered, "Yes, everyone." And he then gave us a copy of a letter dated July 27, which I believe is in evidence.

After reading the letter, Mr. Stumpf remarked, "Rudy, we have a contract in effect with the Pabco Company that has been established over many years of negotiations and our people have job rights with the Pabco plant that have been established over many years of service, and they have a right to expect us to protect those rights." In fact, he said we would be miserable representatives if we didn't protect those rights.

Mr. Thumann stated that they had contacted their legal advisers and their legal advisers had told them that they were within their legal rights to contract out this work for economic reasons.

Mr. Stumpf then said, "Rudy, you are not eliminating any jobs, you are eliminating our people."

And Mr. Thumann answered, "Well, don't blame me, boys. The decision was made by top management as of today after careful study and we are putting it into effect."

I then asked Mr. Thumann if he knew who the contractor would be, and he said, "I do not at this time. There are a couple companies in the picture and as soon as I know I will call you and let you know for sure."

And I asked him to do that. And there were some more discussion on our job rights of our people. I asked Mr. Thumann for a meeting with our full committee so our people could be informed, stating that I thought if this were to hit them cold without a meeting they would possibly walk off the job.

Mr. Thumann said, "Why would they walk off the job? They would jeopardize any of their benefits and also lay themselves open to injunctions and law suits," etcetera.

Mr. Stumpf then stated that these people had job rights and we should have a meeting and sit down and negotiate.

Mr. Thumann replied that they had consulted their legal advisers and they were informed they were within their legal rights and they were going to go ahead with this proposal and contract out the work.

I then informed him that he would get a letter from the Central Labor Council that the Union was seeking strike sanction and, of course, his reply was, "For what? We will have no 1304 employees as of July 31."

Mr. Stumpf said, "Rudy, we are going to do everything in our power to protect the job rights of our people." And with that and a few general things, the meeting was broke up.

Q. Have you told us everything you remember of what was said at that meeting?

A. Yes. I recall that Mr. Thumann at one point asked me what I was going to do. I said, "I don't know at this time. I am so shecked I don't know what we are going to do."

And then Mr. Thumann suggested we contact our legal advisers, find out what our legal rights were.

Q. Do you remember anything else?

A. Only to the extent that when we suggested negotiations, Mr. Thumann's answer was that to negotiate would be pointless as we would have no 1304 members working for Pabco subsequent to July 31.

Q. Anything else?

A. Yes. Mr. Stumpf asked Mr. Thumann what was going to happen to these people and their fringe benefits, such as death benefits, sick leave, termination pay, and one thing and another, and Mr. Thumann's answer was that, "I am working out a system of termination pay and prorated vacation and you will find that I will be quite generous."

. . . . .

Q. Okay. Now, did you talk with Mr. Thumann the next day?

A. On the telephone.

. . . . .

TRIAL EXAMINER: All right. Tell us about your conversation.

THE WITNESS: Mr. Thumann told me that he had talked to Mr. Viat and had informed Mr. Viat that there was no point in having a meeting.

He then informed me that management had determined for sure that it was the Fluor Maintenance Company that would get the contract.

TRIAL EXAMINER: That brought up what you wanted to bring out in the record?

MR. DAVIS: That is right.

Q. (By Mr. Davis) Continue with the conversation with Mr. Thumann.

A. And at that point I said, "Rudy, if you lock our people out, we are going to tangle."

He asked me if I had contacted our legal advisers, and I said that I had.

He asked me what he had said and I told him that in his opinion we still had a contract with Pabco and a right to bargain for our people.

And he asked, "Even no matter who has the contract?"

And I said, "Yes, even though someone else has the contract, we have a right to bargain for our people's jobs."

Q. Now, did you meet on Thursday afternoon?

A. Yes.

Q. And that was Thursday afternoon, July 30?

A. Yes, sir.

Q. And what time did the meeting start?

A. The Union Committee went into the conference room about five minutes after 2:00 o'clock; and I would say it was about ten minutes later when the management committee went into the conference room.

Q. That was the conference room at the Emeryville plant?

A. The Emeryville plant of the Pabco Company.

Q. How many people were present?

A. There was eight on the Union committee, plus one observer, and Mr. Arthur Hellender from the Central Labor Council of Alameda County, and there were five people on management's committee.

Q. And how did the meeting commence; what was said, initially?

A. Well, as we came into the— as Mr. Thumann and his committee came into the conference room, after the customary greetings, Mr. Thumann presented Mr. Stumpf and myself with the letter in answer to the Union's letter of July 29.

Q. Yes. And 8 is the letter of July 30. Is that the letter that was handed to you?

A. Yes. Here it is, a copy of the letter.

Q. Of the letter that was handed to you at this meeting?

A. Yes, sir.

Q. And then what happened?

A. Well, Mr. Stumpf stated, "We are here to negotiate an agreement for these people."

And Mr. Thumann stated that his position, or the Company's position, rather, was clearly contained in the communi-



cation that he had handed us and that it would be pointless to attempt to negotiate a new agreement or any modifications of the agreement.

There was much general discussion and questions asked. For instance, the discussion centered around the shortness of notice, and questions were asked by Mr. Arca as to when Pabco had started contemplating the contracting out of maintenance work, and Mr. Thumann answered that for some time they had been studying it, and Mr. Arca asked why the Company waited for such a late date to notify the Union, and Mr. Thumann's answer was that, of course, they didn't broach these things until they knew for sure where the Company was going.

And during the exchange Mr. Thumann stated that he would not answer Mr. Arca because he was being interrupted and suggested that I ask the question, which I did.

Q. What was the question?

A. "Why did you wait for so long before you notified the Union?"

And he gave me much the same answer as I just stated that he gave Mr. Arca, that they didn't know until Monday where they were going, and that he had notified Mr. Stumpf and myself at that time.

Q. Continue.

A. There was other general discussion. Mr. Thumann at one point stated that if the shortness of notice perturbed the Union, if they were talking about an extension, it might be a different matter.

Mr. Stumpf proposed an extension of thirty days.

Q. What did Mr. Stumpf say?

A. Mr. Stumpf said, "All right, Rudy, let's extend the contract thirty days and arbitrate the issue or let the National Labor Relations Board decide what our rights are."

Mr. Thumann stated that he didn't see how you arbitrated anyone's legal position.

Q. Now, I show you General Counsel's Exhibit 9, and does your signature appear upon this exhibit?

A. Yes, sir.

Q. And the other signatures are the signatures of those who were present?

A. Yes, sir.

Q. And I call your attention to the writing that begins,

which is in pencil, "These representatives of Fibreboard are not in attendance for contract . . ." When was that added?

A. At the conclusion of the meeting.

Q. And who wrote that?

Could you describe how it came about that this was added?

A. Yes. Towards the end of the meeting, Mr. Thumann requested a copy of the signature page. They tried to run it through the duplicating machine, but it is signed in ink and wouldn't take, so we passed around another paper and all of us re-signed the other paper for the Company, then Mr. Thumann asked Mr. Stumpf to see this copy, and he made the notations below in his own handwriting.

• • • • •  
 TRIAL EXAMINER: You are excused. Thank you very much. (Witness excused.)  
 • • • • •

#### **R. C. THUMANN**

a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

#### **DIRECT EXAMINATION**

Q. (By Mr. Plant) I think I neglected to ask you, how many production employees are employed at the Emeryville Plant, that is, employees—

A. The hourly workers in July averaged about 750.

Q. Did that include the maintenance people?

A. It did.

Q. About how many of those were maintenance people?

A. About 73.

Q. That is, maintenance and power house?

A. Correct.

• • • • •  
 Q. (By Mr. Plant) Now, there has been testimony regarding a meeting between you and Mr. Ferber and Mr. Stumpf on June 27, and about another meeting between yourself and others, and those two gentlemen and the rest of the Union committee on July 30. At either of those two meetings did you say anything to the effect that it would be pointless to negotiate regarding termination allowances?

A. I did not.

Q. Did you make any statements to the effect that it would be pointless to negotiate about something?

A. I did not.

Q. Well, did you make any statements to the effect that it would be pointless to negotiate a new contract?

A. I did.

• • • • •

Q. (By Mr. Plant) Did you at any time during those meetings state that it would be pointless to negotiate about anything other than renewal of the contract?

A. I did not.

• • • • •

Q. (By Mr. Plant) Now, Mr. Thumann, when did Fluor Maintenance workers first come into the plant and start working?

• • • • •

A. The first workers that were in the plant were—to my knowledge, was when the picket line of July 31 at 6:00 p.m. was thrown up around the plant.

TRIAL EXAMINER: When did they come in, directly after that, within an hour?

THE WITNESS: They were already there when the picket line was thrown up at 6:00 p.m., July 31, supervisory people, not workers; management people.

Q. (By Mr. Plant) How many were there?

A. I don't know.

Q. Where were they?

A. In the power house.

Q. What were they there for?

A. In order to learn the operation of the power house by observation so that when the last of the power house engineers, the 1304 employees, left at the end of the swing shift, which would be 11:00 o'clock that night, they would be able to take over and operate.

Q. When did the first hourly maintenance workers employed by Fluor get into the plant?

A. On Tuesday, August 18.

Q. What was the reason for that delay?

A. The delay was occasioned by problems attendant to securing the workers and other things of that nature.

Q. Was there any picketing during that period?

A. There was picketing, correct.

Q. How many of them got in on the 18th?

A. My understanding was that it was about a dozen that came to work on the 18th.

TRIAL EXAMINER: Non-supervisory employees?

THE WITNESS: Yes, the hourly workers, craft people.

Q. (By Mr. Plant) Did they return to work on the 19th?

A. They endeavored to return to work on the 19th.

Q. What happened?

A. As they came to work there was such mass picketing and threats of violence that the police closed off the 64th Street entrance of the plant and would not allow anyone to proceed to work.

Q. When did they next come to work?

A. They next endeavored to come to work on the 21st.

Q. Did they succeed?

A. Yes.

TRIAL EXAMINER: Did they go to work that day?

THE WITNESS: Yes, they did.

Q. (By Mr. Plant) How many?

A. About 22.

Q. Was that the full force?

A. No, that was not the full force.

Q. When did the first full group of maintenance workers come in?

A. On Monday, the 24th.

Q. How did they come into the plant?

A. They came in in covered vans.

#### BEN A. WILSON

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

TRIAL EXAMINER: What is your name, sir?

THE WITNESS: Ben A. Wilson.

TRIAL EXAMINER: Mr. Wilson, where do you live?

THE WITNESS: In Palo Alto.

TRIAL EXAMINER: You may be seated, sir.

Mr. Plant, you may proceed with the examination of Mr. Wilson, who has been duly sworn.

### DIRECT EXAMINATION

Q. (By Mr. Plant) Mr. Wilson, are you connected with Fibreboard Paper Products Corporation?

A. I am.

Q. In what capacity?

A. Director of Purchases.

Q. How long have you held that position?

A. Two years.

Q. Prior to that what positions did you hold?

A. Prior to that I was manufacturing manager for the building materials division, dating back to 1956. Prior to that I was manager of the Emeryville operation.

Q. Now, while you were manager of the Emeryville operation, was any sort of study made relative to the question of contracting out maintenance and power house work?

A. Yes, there was.

Q. Did you participate in that study?

A. I did.

Q. Over how long a period did it last?

A. I would say that the subject was considered over a period of a couple of years.

Q. Commencing about when?

A. In 1954, '55, '56, would be the—

Q. And did you reach any conclusions as to the desirability of contracting out work?

A. Yes. Our conclusions were that it offered some very interesting possibilities for improving the economy of the maintenance operations.

Q. Was anything done about it at that time?

A. No, the matter was dropped.

Q. Why?

A. At the time that we received a very preliminary proposal on the subject of contract maintenance I had moved from the Emeryville plant, in fact, and this was during a year in which the Fibreboard Products, Fibreboard Paper Products Corporation was formed with the merger of Pabco Products and Fibreboard Products, Incorporated. The problems of merging the two companies and the absorption of a good many plants into the system were of such magnitude that we simply

did not have the time and attention to devote to this problem, and it was dropped for that reason.

TRIAL EXAMINER: Without going into the details or mentioning names, I don't think it is necessary at this time, who was in these discussions, you and the President of the Company or—

THE WITNESS: No. At that time I reported to a vice-president in charge of manufacturing, and our discussions were with him and with other members of the organizational staff, the San Francisco Office, and then the Emeryville operations.

TRIAL EXAMINER: All right.

Q. (By Mr. Plant) Who was the vice-president in charge of manufacturing at that time?

A. Mr. J. H. Havard.

Q. Now, you mentioned the absorption of additional plants. How many additional plants were absorbed by Pabco by reason of this merger?

A. There were in the order of 15, I couldn't state exactly, but about 15 plants in the Fibreboard Products organization.

Q. Did the matter of reorganizing the administration of the corporation take some time or was it just a matter of short duration?

A. The organization took a total of almost two years, really. It was particularly active in the year 1956.

Q. Now, earlier this year did you again participate in a review of the question of contracting out work?

A. I did not.

Q. Well, did you have anything to do with such a review?

A. I did. I was requested in my capacity as director of purchases to find capable contractors who might be interested in and qualified for this maintenance work.

Q. And who made that request of you?

A. Mr. Burgess.

Q. About when was that, do you recall?

A. As nearly as I can recall, about the 14th or 15th of July.

TRIAL EXAMINER: Who is Mr. Burgess?

THE WITNESS: Mr. Burgess is vice-president of Manufacturing for the Company and my immediate superior.

TRIAL EXAMINER: And what is the first name?

THE WITNESS: George.



MR. PLANT: I believe there is testimony in the record already that he had only recently assumed that position.

Q. (By Mr. Plant) Now, when Mr. Burgess first talked to you, what did he say to you about it?

A. He asked me to make contact with contractors who would be qualified and interested in doing this maintenance work.

TRIAL EXAMINER: You mentioned earlier about a preliminary report that you got. When was that report made, about when, what year?

THE WITNESS: Oh, this is going back to the earlier conversation?

TRIAL EXAMINER: Yes.

THE WITNESS: About 1955 or early in 1956, to the best of my recollection.

TRIAL EXAMINER: Was that report made in writing?

THE WITNESS: Yes, it was.

TRIAL EXAMINER: Who made the report?

THE WITNESS: A professional engineer who was employed to make the survey by the maintenance corporation.

[TRIAL EXAMINER:] You said you got in touch with some contractors this year, is that right?

THE WITNESS: That's right.

TRIAL EXAMINER: Did you do so in writing?

THE WITNESS: The initial requests were by phone.

TRIAL EXAMINER: All right.

Q. (By Mr. Plant) At the time that Mr. Burgess talked to you, had any study been made of the Company's cost of maintenance?

A. Yes, there were substantial studies that had been made.

Q. Had those been brought up to date?

A. I believe that they had.

Q. Well, now, after Mr. Burgess talked to you, just tell us what you did.

TRIAL EXAMINER: I don't think you fixed the date of the conversation.

MR. PLANT: He said July 14 or 15.

MR. DAVIS: Of this year?

MR. PLANT: Yes.

A. On Mr. Burgess' request, we selected several contractors whom we believed qualified to do this work, con-

A. It seems a fairly clear statement to me.

Q. What does that fairly clear statement mean to you?

A. Exactly what it says, that their proposal was to keep the crew sizes as small as possible, keeping in mind the requirements of the work.

Q. Well, what does "below requirements" mean to you?

MR. PLANT: I will submit that this is argumentative. The letter speaks for itself.

TRIAL EXAMINER: Well, you offered it and he can cross-examine him on it.

Does it mean a smaller crew than you formerly had or were having at that time?

THE WITNESS: That is what I took it to mean.

TRIAL EXAMINER: Did you discuss it prior to that letter, discuss the number of people Fluor was going to employ?

THE WITNESS: The letter itself refers to their "preliminary ideas relative to crew requirements."

TRIAL EXAMINER: So you did discuss it?

THE WITNESS: That's right.

### REDIRECT EXAMINATION

Q. (By Mr. Plant) I refer you to Respondent's Exhibit 2, Mr. Wilson, and particularly to the statement in the third from the last sentence which reads: "We further propose that the initial crew size should be held below requirements . . ." Will you state whether or not you understood the word "requirements" as referring back to anything which preceded it in that letter?

A. Yes. I take that to refer to the last paragraph on the first page, which tabulates the requirements that they anticipate.

Q. At the time you made your selection of Fluor as the contractor, did you know what Fluor contemplated dealing with in connection with the work at your plant?

A. No.

Q. Immediately prior to your decision to select Fluor, what other contractor or contractors were still in the picture?

A. The Rosendahl Company.

Q. And what were the factors which determined you in favor of Fluor rather than Rosendahl?

A. The factors that influenced us in favor of Fluor were these. The principal factor was their established reputation and performance.

TRIAL EXAMINER: Whose?

THE WITNESS: Fluor's.

Q. (By Mr. Plant) Which of them was the larger organization?

A. The Fluor organization.

Q. Did you have any idea as to the comparative sizes?

A. Yes. The Fluor Corporation is an engineering corporation with approximately a \$200 million annual volume. Rosendahl would be approximately one-tenth that size in annual business.

TRIAL EXAMINER: You are excused, sir. Thank you very kindly.

(Witness excused.)

TRIAL EXAMINER: You may proceed with your oral argument.

MR. PLANT: You will recall, Mr. Examiner, that at the outset of this case I made an opening statement in which I set forth the facts which the evidence to be introduced would reveal, and I think if you would review that opening statement, in light of the evidence, you will find that the evidence established the facts exactly as I said they would be established.

During the course of the meetings the Union proposed, number one, that Thumann instruct the contractor to employ 1304 people, and, two, that they renew the contract with a provision that any contractor be required to employ 1304 people. And again Mr. Thumann rejected the proposal for the entirely legitimate and proper reason which he conveyed to the Union, that the reason for contracting out the work would be to effect economies because they felt that the contractor could do it cheaper and they did not wish to take action which would tie the contractor's hands in that respect.

(Whereupon, at 5:15 o'clock p.m., Tuesday, September 22, 1959, the hearing was closed.)

tacted them and asked them to call on us to discuss the matter.

Q. (By Mr. Plant) Who were those contractors?

A. The contractors that we initially talked to were the Bechtel Corporation, Rosendahl Corporation, and Pacific Mechanical Maintenance.

Q. Now, did you carry on any discussions with those contractors?

A. (Continuing) We explained the nature of the operations, took the contractors to the Emeryville operations to see for themselves the physical layout of the property and plants.

Q. (By Mr. Plant) Let me interrupt you. You say you took them. You didn't take them all in one group, did you?

A. No.

Q. On separate occasions?

A. On different occasions. And we discussed with them the terms and conditions under which they would consider doing this work.

Q. When did you first get in touch with the Fluor Corporation?

A. Approximately one week later, the 21st of July, as I recall it.

Q. Will you state how you happened to get in touch with them?

A. We learned that they were doing maintenance work for the Union Oil Company and called them. After checking to find out the nature of the work that they did and the company's reputation we called them and asked if they would be interested, and they replied affirmatively and sent a representative to talk with us.

Q. Where was this work of Union Oil Company?

A. This was at the Oleum Refinery.

Q. Now, did you hold some discussions with Fluor?

A. Yes, we did.

Q. And those extended over how long a period?

A. Well, those extended over a period of approximately ten days from the time of initial contact to the time of reaching an agreement with them.

MR. PLANT: I have a letter here dated July 24, 1959, addressed to Fibreboard by Fluor, which I will ask be marked Respondent's Exhibit 1 for identification.

Q. (By Mr. Plant) Now, I show you Respondent's Exhibit 1 for identification, Mr. Wilson, and ask you if you received the original of that communication through the mail?

A. That is right.

Q. On what day did you receive it?

A. On the 27th day of July.

MR. PLANT: I will offer Respondent's Exhibit 1 for identification in evidence.

Q. (By Mr. Plant) Now, had you prior to receipt of this letter of July 27, which has been marked Respondent's Exhibit 1, —

TRIAL EXAMINER: The letter is dated July 24.

MR. PLANT: Yes, the letter is dated July 24.

Q. (By Mr. Plant) Had you prior to that had discussions with Fluor?

A. Yes, we had.

Q. And had they gone through the plant?

A. Yes.

Q. Now, did you have further discussions with them after your receipt of this letter?

A. Yes, we did.

TRIAL EXAMINER: When did you first contact Fluor?

THE WITNESS: The 21st of July.

TRIAL EXAMINER: When did anybody from Fluor come out and inspect the plant or the power house?

THE WITNESS: On the 22nd.

MR. PLANT: Now, I have a letter addressed to Fibreboard, under date of July 30, 1959, on the letterhead of Fluor Maintenance, which I ask be marked as Respondent's Exhibit 2 for identification.

TRIAL EXAMINER: All right. Is there any question about when this letter was received by the Respondent in this case, Mr. Davis?

THE WITNESS: It was handed to them on July 30, at the July 30 conference.

TRIAL EXAMINER: No, I am referring to Respondent's Exhibit No. 1.

MR. DAVIS: If Mr. Plant says so, I will take his word for it.

TRIAL EXAMINER: That the Company received it on July 27?

MR. DAVIS: I didn't even know it was dated July 30.

TRIAL EXAMINER: I am talking about Respondent's 1. That is dated July 24.

MR. DAVIS: No, no argument there.

Q. (By Mr. Plant) Mr. Wilson, Respondent's Exhibit 1 says, "Attached is our formal proposal for maintenance work at your Emeryville facilities." I am now showing you a document in a blue cover, somewhat bulky document, at the front of which appears "Fluor Maintenance, Inc., Los Angeles, California," and ask you if that was the document that you received with Respondent's Exhibit 1.

A. Yes, it was.

MR. PLANT: I will ask that the blue-covered document be accepted in evidence as Respondent's Exhibit 1-A.

Q. (By Mr. Plant) Now, Mr. Wilson, will you take a look at Respondent's Exhibit 2 for identification, being the letter addressed to Fibreboard, to your attention, under date of July 30, 1959, and I will ask you if you received that letter or the original letter?

A. Yes, sir.

Q. Did you receive it through the mail or was it delivered to you?

A. This was delivered to me.

Q. By whom?

A. Mr. Day.

Q. And when was it delivered to you?

A. On the 30th of July.

TRIAL EXAMINER: Where were you when you received the letter?

THE WITNESS: In my office.

Q. (By Mr. Plant) About what time of day was it?

A. I cannot recall.

TRIAL EXAMINER: Was it morning or afternoon?

THE WITNESS: My recollection would be afternoon.

Q. (By Mr. Plant) Now, the letter starts out, Mr. Wilson, as follows: "We are pleased to confirm our various conversations and recommendations relative to the contract maintenance



## 2.6 Other Approved Costs

All other direct field costs encountered in the performance of the work as approved by Fibreboard shall be reimbursable.

## 2.7 Small Tools

2.71 Our usual experience has been that the client desires to furnish the small tools required for performing the work. However, we have an adequate supply of small tools required for performing all maintenance and construction functions and these tools can be furnished under mutually agreeable circumstances.

2.72 Where small tools are furnished by the client, Fluor Maintenance, Inc., assures diligent and responsible care for all such tools assigned to our responsibility. We are attaching as Exhibit "B" our typical list of available small tools.

2.73 If it is requested that Fluor Maintenance, Inc., purchase small tools for Fibreboard's account, Fluor Maintenance will receive reimbursement of actual cost including applicable taxes.

## 2.8 Equipment

Fluor Maintenance, Inc., can furnish any equipment for maintenance or construction work that may be required to supplement the equipment owned by Fibreboard. We propose to furnish any equipment required for standard A.E.D. rental rates in effect for the area of your plant location. For further information we are including with this proposal under Exhibit "A" our list of available equipment and typical current rates. Insurance will be carried on this equipment by Fluor Maintenance, Inc., with no added cost to Fibreboard.

## 2.9 Fee

For administrative overhead and profit for the performance of maintenance work proposed herein, Fluor Maintenance proposes to receive the sum of the following:

2.91 An annual fixed fee of TWENTY-SEVEN THOUSAND DOLLARS (\$27,000).

## 2.92 Materials

A fee of 5 per cent for all materials purchased or

nance services proposed for your Pabco Emeryville Plant." Had you had conversations with Fluor covering the subject matter of this letter?

A. Extensive conversations.

Q. Will you state what the reason or reasons were for Fibreboard's decision to contract out the maintenance work?

A. The reason was to achieve greater economy in our Emeryville operations.

Q. Do you know from the studies which were made what your cost of maintenance and power house work had been running at Emeryville?

A. The total cost had been running in the order of three-quarters of a million dollars.

TRIAL EXAMINER: A year?

THE WITNESS: Per year.

Q. (By Mr. Plant) On the basis of your discussions with the several contractors, had you arrived at any conclusion as to what if any savings might be effected by contracting out the work?

A. We felt that economies up to one-third of that total were entirely possible.

Q. Who was it that decided that Fluor should be the contractor?

A. I did.

Q. When did you make that decision?

A. On the 27th of July.

Q. At about what time of day?

A. At approximately 8:00 p.m.

Q. In the evening?

A. In the evening.

Q. And upon what was that decision based?

A. The decision was based on our evaluation of the experience, the skill and potential value of the contractor, as well as the economic considerations that he presented.

Q. Had you made any investigation to determine what other companies Fluor was doing maintenance work for?

A. Yes. We had firsthand knowledge through the Union Oil Company of their contract and their work at the Oleum Refinery. Our people had visited that plant to see first-hand how the work was conducted.

Q. Had you investigated or checked upon whom else they might be doing work for?

items subcontracted pursuant to paragraphs 2.4, 2.6, and 2.73.

### 3.0 TERM OF AGREEMENT

We propose that the maintenance contract and combined services should be on the basis of a two-year contract biannually renewable and may be canceled by Fibreboard for good and sufficient reasons with a sixty days' notice. In the event of cancellation, Fibreboard will pay to Fluor Maintenance, Inc., as complete and final compensation the total amount of reimbursable costs and fees provided for in the agreement, as accrued to the date of cancellation, which had not been previously paid.

### 4.0 FACILITIES

#### 4.1 *Field Office Space*

Our requirements for field office space and other facilities are quite modest and limited. Usually, existing temporary type buildings will adequately serve our purpose. An inspection of the plant site to determine the requirements and the availability of existing facilities will best establish working space.

#### 4.2 *Workmen Accommodations*

Also, the requirements for workmen accommodations of change room, locker and tool storage space are modest. Our usual requirements are of the temporary type that require minimum costs. We can adapt our requirements to your convenience.

### 5.0 GENERAL CONTRACT MAINTENANCE OPERATIONS

We propose that our day-to-day operations will be a functioning component of your organization, subject to your overall direction. Further, we propose that the inspection of our work completions would be under the direction of Fibreboard.

### 6.0 FLUOR MAINTENANCE, INC., HOME OFFICE FUNCTIONS

The home office functions of Fluor Maintenance, Inc., include the following:

6.1 Close and regular liaison with Fibreboard management to insure complete service and satisfaction on your part.

A. We had determined that they were doing and had been doing work for some time for the American Oil Company in the East, although we did not personally investigate that.

Q. Did you check their relationship with Tidewater Oil Company?

A. We were told and found that it was true that the Tidewater Oil Company was contracting with Fluor Maintenance also.

Q. Where?

A. At the Avon Refinery.

Q. Did you solicit or obtain any reports from any of these people as to whether or not Fluor was a competent or satisfactory contractor?

A. We had the firsthand enthusiastic testimony of people at Union Oil Company, whom we are well acquainted with.

Q. Now, following delivery to you of that letter of July 30, was a draft of a proposed contract between Fibreboard and Fluor prepared?

A. Yes, it was.

Q. And when was that done?

A. That draft was prepared during two days, July 30 and 31.

Q. And who participated in the preparation of the draft?

A. Our General Counsel; Mr. Charles Day of the Fluor Corporation.

Q. You don't mean he is your General Counsel?

A. No, and Mr. Charles Day.

TRIAL EXAMINER: Mr. who?

THE WITNESS: Mr. Charles Day.

TRIAL EXAMINER: Charles Day is with Fluor?

THE WITNESS: Yes.

TRIAL EXAMINER: Just the three of you sat in on it?

THE WITNESS: At various times other members of our staff from San Francisco, including our people on insurance and various other contractual aspects of the contract, sat in, members of my own staff.

MR. PLANT: Now, I am going to ask that there be marked for identification as Respondent's Exhibit 3 a letter of which I, unfortunately, have only one copy, but I will supply an additional one.

Q. (By Mr. Plant) I will show you Respondent's Exhibit

3, Mr. Wilson, and ask you if the signature which appears thereon is a facsimile of your signature.

A. That is correct.

Q. Did you mail or send the original of that letter to Fluor on or about July 31?

A. The original was delivered in person to Mr. Day on that date.

Q. Where was that done?

A. Mr. Day was at the Claremont Hotel.

Q. And you took the letter over to him?

A. I did not, personally. It was delivered by Mr. Sparrowe of our Company.

TRIAL EXAMINER: What was his business, what was it on that day, July—

THE WITNESS: Insurance Manager.

TRIAL EXAMINER: And what is his first name?

THE WITNESS: Arch.

Q. (By Mr. Plant) Now, did you enclose with this letter two copies of a draft of a maintenance agreement?

A. Yes, sir.

Q. (By Mr. Plant) Now, following the delivery of that letter and the enclosed drafts, did you make any changes in the draft?

A. We did.

Q. When was that done?

A. On the 4th of August.

Q. It was on Tuesday?

A. Tuesday.

Q. And who made the changes?

A. Mr. Day, his counsel, myself and our General Counsel.

Q. Now, following the making of those changes in the draft, was anything done about signing the contract?

A. The redrafted contract was submitted to Mr. Burgess, of our Company, for signature, and he signed it that afternoon and it was given to Mr. Day.

Q. Did he sign it then?

A. Mr. Day did not sign it then.

Q. Did he take it with him?

A. Yes.

MR. PLANT: Now, I have shown to General Counsel a letter which I will ask be marked Respondent's Exhibit 4 for identification.

MR. PLANT: Mr. Davis, will you stipulate that the original letter, of which Respondent's Exhibit 4 is a copy, was received by Mr. Tuft, of my office, together with executed duplicate originals of the maintenance agreement on or shortly after August 11, 1959?

MR. DAVIS: If you assure me that that is so, I will so stipulate.

MR. PLANT: Mr. Tuft assures me that that is so.

MR. DAVIS: All right, then.

Q. (By Mr. Davis) Well, you had under study the question of savings and whether or not this contracting out certain work would be a saving for Fibreboard, didn't you?

A. The Company had this under study.

Q. (By Mr. Davis) You were in on the discussions concerning the savings?

A. Yes.

Q. And what employees were you concerned with on savings, what employees, what were the employees doing?

A. The employees were doing maintenance work and power house work.

Q. And on July 27, Respondent's Exhibit 1-A was received, is that correct?

A. That's right.

Q. And you studied this exhibit, is that correct?

A. Yes.

Q. And you made the decision that Fluor should get the contract, you testified to that?

A. Yes.

Q. And the considerations upon which you based your decision included the items in this exhibit, is that correct?

A. That's correct.

Q. Now, I call your attention to Exhibit D and ask you,



this is one of the items that you read and were familiar with, is that correct, the items contained in Exhibit D in Respondent's Exhibit 1-A, Subsection D?

A. In general I was familiar with this section.

Q. Now, Subsection D of Respondent's Exhibit 1-A contains a copy of the Yorktown, Virginia, Project Maintenance Agreement between Fluor Maintenance and various International Unions? Will you look at this agreement and tell me if the United Steelworkers of America is one of the unions named—

MR. PLANT: I will object to the question upon the ground that the document is in evidence and speaks for itself.

TRIAL EXAMINER: Overruled.

Are they named, the United Steelworkers of America, are they a party to this contract or contracts?

THE WITNESS: No.

Q. (By Mr. Davis) You knew that Fluor intended to put—to operate maintenance and power house work that you were awarding them on the basis of this Yorktown Agreement, did you not?

A. I knew that they had no contract at the Yorktown Works. This was offered as a proposal and was illustrative of the type of operation that they would do for us. This is not a contract.

Q. Well, it is a copy of a contract?

A. Yes, an illustrative one.

Q. And you knew that the Yorktown agreement was the one that they intended to put into effect in Fibreboard?

A. The type of agreement, yes.

Q. And you knew that when you awarded them the contract, you knew that Steelworkers would not be employed by Fluor, is that correct, members of the Steelworkers?

A. No, it is not.

Q. (By Mr. Darwin) Now, Mr. Wilson, will you tell me what you understood by the phrase "We further propose that the initial crew size should be held below requirements to initiate in the minds of all concerned that each man is going to have to perform to a maximum in order to get the required volume of work completed on time"? What did you understand by the phrase "the initial crew size should be held below requirements"?

We tabulate below our preliminary ideas relative to crew requirements:

Boiler House .....	8
Electricians .....	9
Fitters .....	9
Welders .....	2
Machinists .....	15
Oilers .....	4
Millrights .....	7
Carpenters .....	2
Laborers .....	4
<b>Total</b> .....	<b>60</b>

You will note that we propose a greater number of crafts than you are currently utilizing. This allows for maximum performance for each job since the craftsman's skill will more closely match the job requirements. Due to our flexibility, we will not be required to keep any craft on the job when there is no work available.

We further propose that the initial crew size should be held below requirements to initiate in the minds of all concerned that each man is going to have to perform to a maximum in order to get the required volume of work completed on time.

We have verbally presented tentative rate schedules to Mr. Van Voorhees. We are working on firming up these rates and will present them in a schedule to you within the next day or two.

If we can provide any additional information, please advise.

Very truly yours,  
FLUOR MAINTENANCE, INC.

Andrew W. Ferguson  
Sales Engineer

**RESPONDENT'S EXHIBIT 3**

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**FIBREBOARD PAPER PRODUCTS CORPORATION**  
475 Brannan Street, San Francisco 19, California

July 31, 1959

Fluor Maintenance, Inc.  
2500 South Atlantic Boulevard  
Los Angeles 22, California

Attention: Mr. Charles H. Day  
Vice President-Manager

Gentlemen:

Herewith are two copies of the retyped draft of our maintenance agreement. We believe this is satisfactory but suggest that it would be well for us to get in touch with each other early next week for final approval and signature. In the meantime you are authorized to proceed in accordance with the provisions of the agreement.

Very truly yours,

**FIBREBOARD PAPER PRODUCTS CORPORATION**  
B. A. Wilson  
Director of Purchases

**RESPONDENT'S EXHIBIT 4**

---

**FLUOR MAINTENANCE, INC.**  
2500 South Atlantic Boulevard  
Los Angeles 22, California

August 11, 1959

Malcolm Tuft, Esquire  
Brobeck, Phleger and Harrison  
111 Sutter Street  
San Francisco, California

Dear Mr. Tuft:

Enclosed please find two completely executed duplicate originals of the maintenance agreement between this company and Fibreboard Paper Products Corporation.

**RESPONDENT'S EXHIBIT 1**

**FLUOR MAINTENANCE, INC.**  
2500 South Atlantic Boulevard  
Los Angeles 22, California

July 24, 1959

**Fibreboard Paper Products Corporation**  
475 Brannan Street  
San Francisco 19, California

Attention: Mr. B. A. Wilson  
Director of Purchases

Gentlemen:

Attached is our formal proposal for maintenance work at your Emeryville facilities. This confirms our several discussions and verbal presentations.

You will note as the final paragraph of the proposal we suggest it be used as a basis for a mutually acceptable contract. This is to advise that we will be happy to work on the basis of an accepted proposal letter until such time as the formalities of this contract can be completed.

We recognize the time urgency on starting of this project with your machinists' labor agreement expiring at midnight July 31, 1959, and your desire to start contract maintenance operations immediately thereafter. We want to assure you that we can staff the maintenance operations and take over all maintenance functions and boiler plant operations as of that time without serious interruption to the regular production schedules. In order to accomplish this we need a few days' preparation and would appreciate receiving your approval on Monday, July 27, 1959.

If we are awarded your contract maintenance work, we would recommend that during the early phases additional Fluor supervisory personnel be at the jobsite to insure an absolute minimum of interruption or confusion during the change over. We have these people immediately available on the West Coast.

We also have available technically trained engineers with extensive experience in operation of boiler plant facilities. We

recommend consideration be given to utilization of these personnel while training new operators for the power plant.

We have attempted in the proposal to cover all of the subjects of our discussion; but in case additional questions should arise, we would be pleased to answer them in conference or any other method that would be to your convenience so that complete understanding is achieved.

It has been our pleasure to have the opportunity to meet with you and to present our proposal to your company, and we would like to assure you that we can serve your interests and needs to your complete satisfaction.

Very truly yours,  
**FLUOR MAINTENANCE, INC.**  
 Andrew W. Ferguson  
 Sales Engineer

#### **RESPONDENT'S EXHIBIT 1-A**

**FLUOR MAINTENANCE, INC.**  
 2500 South Atlantic Boulevard  
 Los Angeles 22, California

July 24, 1959

Fibreboard Paper Products Corporation  
 475 Brannan Street  
 San Francisco 19, California  
 Attention: Mr. B. A. Wilson  
 Director of Purchases

Gentlemen:

We wish to present for your consideration our proposal for performing contract maintenance and other such work as your company may assign to Fluor Maintenance, Inc., at your Pabco Plant in Emeryville, California.

#### **1.0 SERVICES TO BE PERFORMED**

We propose to furnish any or all of the following services that will meet with your requirements at your convenience.

##### **1.1 Contract Maintenance**

We propose to furnish a service to your company that will provide a basic contract maintenance crew to serve as the nucleus of supervision, skilled mechanics, and unskilled labor forces that can be expanded or contracted to meet your

day-to-day assigned work schedule or turnaround requirements. This crew can be decreased on a few hours' notice or expanded to perform only your required productive maintenance functions.

### **1.2 *Modification, Alteration, and Plant Improvement***

We further propose to perform all assigned work within your plant of such nature as modification, alterations, plant improvement, and additions. This work can be performed by the same workmen who are assigned to the regular maintenance work. The work assignments will naturally be within the skills, experience, and abilities of the respective craftsmen so that the greatest amount of efficiency with the lowest cost will be obtained.

### **1.3 *Minor Construction Work***

The basic crews we propose to furnish for the maintenance, modifications, alterations, and plant improvement work will also be available for and qualified to perform any minor construction work that you assign to us. We are confident you will find, as other plant managements have found, that these crews will be a very important factor in your plant operation. Because we are established on your jobsite with a functioning organization, we can perform the work at a lower cost than outside groups.

### **1.4 *Supervision and Office Help***

We propose to furnish well-qualified supervisors with years of successful background experience in refinery maintenance work. Our basic crew would require only one superintendent who would be eminently qualified to work cooperatively with and under your management so that our work would be functioning as an integral part of your operating organization. Our superintendent and staff would also perform the following functions:

- Making recommendations for systematic maintenance and preventive maintenance programs.

- Planning and coordinating all phases of maintenance and plant improvements to eliminate interferences or interruptions to production.

- Planning for periodic inspections and inspection shut-downs.

Our recommendations for supervisors are always sub-



## PABCO PROPOSALS FOR 1959

### SECTION I—WAGE SCALES

We would like to arrive at a basis to eliminate the unfair wage discrepancy between the machinist and the other crafts in the plant.

### SECTION IV—SENIORITY

Paragraph b—Change ninety (90) days to thirty (30) days.

### SECTION V—HOURS OF WORK AND OVERTIME

We request a 35 hour week—schedule of shifts to be worked out.

### SECTION XII—HOLIDAYS

1. Add, one additional paid Holiday.
2. Delete worked the day before and the day after, for qualifying.

### SECTION XIII—NIGHT DIFFERENTIALS

- (a) Change to ten (10) percent, and fifteen (15) percent.

### SECTION XV—VACATIONS

We request three weeks vacation after five years of service, and four weeks vacation after fifteen years of service.

### SECTION XVII—WELFARE PLAN

The plant to pay full cost of Health and Welfare. The Plant also to extend the coverage to retired employees under the pension plan.

### SECTION XXI—ADJUSTMENT OF COMPLAINTS

Add new section between (a) and (b) as follows:

Such meeting between an executive of the Plant and a representative of the Machinist Union no later than five working days after referral to the above representatives of the parties. Failure of either party to be available shall constitute concession of the grievance to the other party. The time limit may be extended by mutual agreement.

### NEW

We request five cents per hour to be placed into a fund to provide for supplementary unemployment benefits for em-

mitted to your management for consideration and appraisal of their background of experience and qualifications before any assignments are made. The number of supervisors and office overhead is always under your direct control and subject to your approval in accordance with the assigned work load. This force is quite flexible and subject to modification to meet the day-to-day efficiency requirements.

The necessary field office staff will be responsible for all maintenance payrolls and other related functions. Also, the office staff will supply cost records on all work performed in accordance with your accounting procedures.

Our superintendent will, in all practical purposes, report to Fibreboard plant management. He will become an integral part of your operating organization and will work energetically and cooperatively toward accomplishing your management's orders and objectives.

It is planned that our skilled craftsmen will work with and alongside your production forces so that maximum production and lowest costs will be obtained with plant harmony and progress.

#### *1.5 Technical and Specialized Personnel*

In addition to providing the supervision, skilled and unskilled labor, and clerical help for your maintenance work, we can provide technical and specialized personnel for performing the following functions:

- Corrosion studies and preventive programs.

- Metallurgical engineering special studies.

- Process and development work.

- Safety and personnel training programs.

Other specialized services that are common to our experience in process, chemical, refinery, and steam power plants.

We can furnish this special personnel for short- or long-term assignment, according to your desires, from our backlog of skilled technical specialists available through our parent company, The Fluor Corporation, Ltd. Reimbursement for this special work will be subject to rates established by mutual agreement between your company and The Fluor Corporation, Ltd.

ployees laid off in a reduction in force. To provide at least sixty-five percent of the employee's normal weekly wage, including unemployment benefits.

Qualifications to be those of the State Department of Employment.

**GENERAL COUNSEL'S EXHIBIT 6A**

**FIBREBOARD PAPER PRODUCTS CORPORATION**

P. O. Box 4317 • Oakland 23, California

July 27, 1959

Mr. Wm. F. Stumpf, Representative  
**UNITED STEELWORKERS OF AMERICA**  
610 Sixteenth Street—Rooms 219-220  
Oakland 12, California

**SUBJECT: EMERYVILLE PLANT AGREEMENT**

Under date of May 26, 1959, Mr. Stumpf you notified us of your desire to modify our collective bargaining agreement with your Union dated September 24, 1958, relative to maintenance employees at our Emeryville plant, and of your desire to meet for the purpose of negotiating a new contract to be effective August 1, 1959. Under date of June 15, 1959, you forwarded your contract proposals.

For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.

In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

**R. C. THUMANN**

Director of Industrial Relations

## 2.0 REIMBURSEMENT FOR COSTS

### 2.1 *Direct Labor*

As compensation for furnishing all direct labor, we propose to receive reimbursement at Fluor Maintenance's cost for salaries and wages of all craft labor, foremen and general foremen engaged in the performance of the work; all labor fringe benefits required by applicable labor agreement; payroll taxes, e.g., F.I.C.A., S.U.I., and F.U.I., levied or assessed against Fluor Maintenance, Inc., now or hereafter imposed by any governmental body, which are measured by salaries or wages of employees engaged in the work.

### 2.2 *Supervision, Office Help, and General Field Office Overhead*

We propose to receive reimbursement at Fluor Maintenance's cost for salaries and wages of all field supervisors and field office employees; the pro rata share of vacation and sick leave costs; all payroll taxes, e.g., F.I.C.A., S.U.I., and F.U.I., levied or assessed against Fluor Maintenance, Inc., now or hereafter imposed by any governmental body, which are measured by salaries or wages of employees engaged in our field supervision and office help operations; and, the cost of subsistence, travel time and expense for temporary assignments when required.

### 2.3 *Costs Relating to Labor*

#### 2.31 *General Expenses*

Under "General Expenses" we classify such items as utilities, general field office expenses, such as telephone, telegraph, stationery and operating supplies, expendable field supplies, and such other costs that are not specifically classified but are required at the jobsite to perform the assigned work. We propose that where these items are furnished they will be reimbursable, including applicable taxes.

#### 2.32 *Permits and Inspections*

The actual cost of permits required by any governmental body in connection with the maintenance or construction work herein provided for, and the cost of inspection work required by law or ordinance of any governmental body shall be a reimbursable cost.

### 2.33 Insurance

All insurance required by Fibreboard, plus other coverage that is mutually agreed for complete protection, shall be reimbursable. We are attaching Exhibit "C" of our standard insurance coverage. The insurance requirement can be specifically negotiated to mutual approval between Fibreboard and Fluor Maintenance, Inc.

## 2.4 Purchased Items

### 2.41 Materials Including Transportation

This proposal is based on the intention that the majority of all materials will be supplied and furnished at the jobsite by Fibreboard and that all handling costs, taxes, etc., pertaining to those materials will be for the account of Fibreboard. Where it is the desire of Fibreboard to require Fluor Maintenance, Inc., to purchase materials for the maintenance or construction work, Fluor Maintenance, Inc., will receive reimbursement of actual costs including applicable taxes.

### 2.42 Outside Shop Work

On subcontract work required or performed in outside shops, such as job machine shops, welding shops, electrical shops, pipe shops, paint shops, etc., which is ordered by and paid for by Fluor Maintenance, Inc.; we propose that Fluor Maintenance, Inc., will receive reimbursement of actual costs including applicable taxes and transportation costs.

## 2.5 Additional Management, Planning, Supervisory, Technical or Specialized Services

Any additional services beyond the services included in 2.1, 2.2, 2.3, and 2.4 required and approved by Fibreboard will be supplied by Fluor Maintenance, Inc., in accordance with standards and rates that are applicable to the specific case.

There will be no home office charges included unless special circumstances occur that are not presently anticipated.

In case of any special circumstances incurring home office costs, these will be negotiated with your management and written approval obtained before any commitments are incurred.

- 6.2 Frequent contact with our field supervisor to service all requirements.
- 6.3 Labor contract negotiations and government handling procedures.
- 6.4 Regular meetings with labor representatives to insure harmony and peak production efficiency.
- 6.5 Special meetings to handle any problem, improve cost methods, special problem or mutual benefit efforts.
- 6.6 Regular quarterly meetings with the International Labor President and Representatives in Washington, D. C., to insure top handling of all labor problems and compliance with labor contracts.
- 6.7 Continued research on maintenance methods which can be presented to Fibreboard for their consideration on any possible work improvements or cost reduction plans.

## 7.0 LABOR CONTRACTS

Our years of experience in performing contract maintenance services have taught us that a successful maintenance program is dependent upon good workable contracts with labor. We would propose for your consideration the type of labor contract we have negotiated with the International Presidents. Our experience has proved that this type of contract offers substantial benefits particularly when it jointly includes the local labor representatives' participation but under the International Presidents' supervision. An example of the type of labor contract we propose is included under Exhibit "D" for your inspection.

Fluor Maintenance, Inc., has been assured by the respective International Presidents of the skilled crafts required that we could apply the same contract with the same provisions as the attached Yorktown, Virginia Maintenance Agreement for operation at Emeryville.

This type of labor contract makes available the skilled craftsmen who are familiar with maintenance and construction work but eliminates many of the labor problems encountered when owners perform maintenance with their own crews or with subcontractors who use Building Trades working conditions. Examples of benefits in this type of proposed contract are:

Elimination of most of the fringe benefits, such as travel



time, subsistence, vacation pay, sick leave, termination pay, paid holidays, etc.

We retain the right of complete selection and determination of a craftsman's ability and production.

Right to terminate employees or reduce work forces at any time.

Mixed crew assignments with considerable jurisdictional assignment latitude.

Elimination of any work quotas or work slow-down methods.

Maximum utilization of man-hour savings, tools or equipment.

Right to enforce high rates of production from all maintenance employees.

Labor has assured us of a cooperative endeavor that will give us greater production through our labor forces which will result in giving Fibreboard a lower cost on their maintenance work.

## 8.0 SAFETY

Fluor Maintenance, Inc., is very cognizant of the most important function of on-job safety and safety training with constant vigilant efforts. We will maintain our effective safety program in strict compliance with the requirements and wishes of Fibreboard. We are attaching for your inspection as Exhibit "E" our basic safety standards that can be adapted to your respective plant requirements.

## 9.0 GENERAL WORKING RULES AND PROCEDURES

Fluor Maintenance, Inc., proposes to comply with the working rules and conduct requirements of Fibreboard. Also, we will make every effort to assure Fibreboard of our desire to conduct our work affairs so that no conditions will develop that will cause Fibreboard concern among their work forces.

Further, Fluor Maintenance, Inc., proposes to perform their work so that all possible cooperation will be obtained with Fibreboard. Our work forces will become a cooperative and efficient function of the production and work programs of Fibreboard.

**10.0 CONTRACT AGREEMENT**

Fluor Maintenance, Inc., will be willing to incorporate the provisions of this proposal into a mutually agreeable contract which will serve as the basis of performing assigned work for Fibreboard.

Very truly yours,  
FLUOR MAINTENANCE, INC.  
Chas. H. Day  
Vice President-Manager

**TABLE OF CONTENTS**

EXHIBIT "A"	_____	Rental Rates for Major Construction Tools and Equipment
EXHIBIT "B"	_____	Small Tools
EXHIBIT "C"	_____	Insurance
EXHIBIT "D"	_____	Labor Agreement
EXHIBIT "E"	_____	Safety Program

[Exhibits Omitted]

**RESPONDENT'S EXHIBIT 2**

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**FLUOR MAINTENANCE, INC.**  
2500 South Atlantic Boulevard  
Los Angeles 22, California

July 30, 1959

Fibreboard Paper Products Corporation  
475 Brannan Street  
San Francisco 19, California

Attention: Mr. B. A. Wilson  
Director of Purchases

Gentlemen:

We are pleased to confirm our various conversations and recommendations relative to the contract maintenance services proposed for your Pabco Emeryville Plant.

We have reviewed the present operations in considerable detail by consultation with your personnel and visits to the site. Based on the present conditions where a total of approximately 75 men are being utilized, we are confident that we can perform a comparable level of maintenance with approximately 60 men after the initial period required to acquaint Fluor personnel with the plant and its requirements. Based on our previous experience and our analysis of your current operations, we believe that this sizable reduction of forces is readily attainable. Additional savings will be realized with reduced fringe benefits and reduced overtime rates.

Effective savings will also be gained by preplanning and scheduling of the majority of all services provided by Fluor through the careful use of the "work order" system. This will allow us to have on hand only those men required to perform the work without slow-down. If emergencies arise additional qualified men can be obtained on a few hours' notice. As a result of effective preplanning and scheduling efforts along with carefully organized material controls, we estimate that within a few months we can further reduce the maintenance forces substantially below the 60 man level.

You will note that I have attached Exhibits A and B to the agreement as requested by Mr. Wilson. Exhibit A is the schedule of wage rates previously furnished in another form and Exhibit B is the schedule of rental rates for tools and equipment.

Thank you for your courtesy and cooperation during our conferences last week.

Very truly yours,  
THE FLUOR CORPORATION, LTD.  
Theodore K. Martin  
Associate Counsel

**GENERAL COUNSEL'S EXHIBIT 3**

**District 38  
UNITED STEELWORKERS OF AMERICA  
AFL-CIO**

610 Sixteenth Street • Rooms 219-220 Pacific Building  
Oakland 12, California • Sub-District 3

May 26, 1959

Fibreboard Paper Products Corporation  
P. O. Box 4317  
Oakland 23, California

Attention: Mr. R. C. Thumann, Director of  
Industrial Relations

Gentlemen:

Pursuant to the provisions of the Labor Management Relations Act, 1947, you are hereby notified that the Union desires to modify as of August 1, 1959 the collective bargaining contract dated July 31, 1958, now in effect between the Company and the Union.

The Union offers to meet with the Company at such early time and suitable place as may be mutually convenient, for the purpose of negotiating a new contract.

Very truly yours,  
UNITED STEELWORKERS OF AMERICA  
By Wm. F. Stumpf, Representative  
By Lloyd Ferber, Business Rep.  
Local 1304

**GENERAL COUNSEL'S EXHIBIT 4**

**FIBREBOARD PAPER PRODUCTS CORPORATION**

P. O. Box 4317 • Oakland 23, California

June 2, 1959

Messrs. Wm. F. Stumpf and Lloyd H. Ferber  
**UNITED STEELWORKERS OF AMERICA**  
610 Sixteenth Street—Rooms 219-220  
Oakland 12, California

This will acknowledge your letter of May 26, 1959, requesting a meeting to discuss modifications of the current Agreement between the Emeryville Plant of Fibreboard Paper Products Corporation and the United Steelworkers of America on behalf of the East Bay Union of Machinists, Local 1304.

We will contact you at a later date regarding a meeting for this purpose.

**R. C. THUMANN**

Director of Industrial Relations

**GENERAL COUNSEL'S EXHIBIT 5**

**EAST BAY UNION OF MACHINISTS  
LOCAL 1304**

United Steelworkers of America, AFL-CIO  
3637 San Pablo Avenue  
Emeryville 8, California

June 15, 1959

Pabco Division of Fibreboard Products  
Foot of 64th Street  
Emeryville, California

Gentlemen:

Attn. Mr. Thumann

Enclosed find the proposals of Local 1304, and its members working at the Emeryville Plant for the 1959 negotiations.

We stand ready to meet with you regarding the same at your convenience.

Respectfully,

**EAST BAY UNION OF MACHINISTS  
LOCAL 1304 U.S. of A., AFL-CIO**

**LLOYD H. FERBER**  
Business Agent

**GENERAL COUNSEL'S EXHIBIT 6B****FIBREBOARD PAPER PRODUCTS CORPORATION****P. O. Box 4317 • Oakland 23, California****July 27, 1959**

**Mr. Lloyd H. Ferber, Business Representative  
EAST BAY UNION OF MACHINISTS; LODGE 1304  
United Steelworkers of America, AFL-CIO  
3637 San Pablo Avenue  
Emeryville 8, California**

**SUBJECT: EMERYVILLE PLANT AGREEMENT**

Under date of May 26, 1959, Mr. Ferber, you notified us of your desire to modify our collective bargaining agreement with your Union dated September 24, 1958, relative to maintenance employees at our Emeryville plant, and of your desire to meet for the purpose of negotiating a new contract to be effective August 1, 1959. Under date of June 15, 1959, you forwarded your contract proposals.

For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.

In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

**R. C. THUMANN**  
Director of Industrial Relations



**GENERAL COUNSEL'S EXHIBIT 7**

**District 38  
UNITED STEELWORKERS OF AMERICA  
AFL-CIO**

610 Sixteenth Street • Rooms 219-220 Pacific Building  
Oakland 12, California • Sub-District 3

July 29, 1959

Fibreboard Paper Products Corporation  
P. O. Box 4317  
Oakland, California

Attention: Mr. R. C. Thumann,  
Director of Industrial Relations

Gentlemen: Re: Subject: Emeryville Plant Agreement  
Reference is made to your letter of July 27, 1959.

We interpret your letter to mean that you are attempting to cancel your present agreement with us. If that is your intention, you are too late. We direct you to the provision of the agreement which requires that you should have given us at least sixty (60) days notice of cancellation prior to the July 31, 1959 expiration date.

In the absence of such notice, the contract has been automatically renewed for another year, subject, of course, to your obligation to meet with us at once to discuss the proposed modifications which we sent you, following our notice of May 26 for modifications of the existing agreement.

We trust that you will not lock out the employees covered by our agreement, and that you will not consummate the plan outlined in your letter of July 27th. We call upon you to meet with us at once.

Very truly yours,  
UNITED STEELWORKERS OF AMERICA  
AFL-CIO

By Wm. F. Stumpf, Representative  
By Lloyd Ferber, Business Rep.  
Local 1304

**GENERAL COUNSEL'S EXHIBIT 8**

**FIBREBOARD PAPER PRODUCTS CORPORATION**  
**P. O. Box 4317 • Oakland 23, California**

July 30, 1959

Messrs. Wm. F. Stumpf, Representative, and  
 Lloyd H. Ferber, Business Representative Local 1304  
**UNITED STEELWORKERS OF AMERICA**  
 610 Sixteenth Street—Room 219-220  
 Oakland 12, California

Gentlemen, the following is in reply to your letter of July 29, 1959.

1. The introductory provisions of our Agreement with your Union provide in pertinent part:

"This Agreement shall continue in full force and effect to and including July 31, 1959, and shall be considered renewed from year to year thereafter between the respective parties unless either party hereto shall give written notice to the other of its desire to change, modify, or cancel the same at least sixty (60) days prior to expiration."

Under date of May 26, 1959, you notified us of your desire to modify the Agreement and to meet with us for the purpose of negotiating a new Agreement to be effective August 1, 1959. Under the provision quoted above, our Agreement therefore will expire at midnight July 31, 1959, and will not be automatically renewed. See *American Woolen Company*, 57 N.L.R.B. 647. Our letter of July 27, 1959, was not an attempt to cancel the Agreement but was written in contemplation of the fact that it will, by its terms, expire at midnight, July 31, as set forth above.

2. Aside from the foregoing, the Agreement does not prohibit us from letting work to an independent contractor, and we have the right to do so. See *Amalgamated Association, etc., v. Greyhound Corporation*, 231 F(2d) 585.

3. While it will be necessary for us to lay off or terminate employees heretofore performing the work to be taken over by the contractor, we do not contemplate any lockout.

4. As we stated in our letter of July 27, it appears to us that since we will have no employees in the bargaining unit

covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless. However, we repeat that we will be glad to discuss with you at your convenience any questions that you may have.

**R. C. THUMANN**

Director of Industrial Relations  
Charles J. Smith, International-Pittsburgh, Jay Darwin

**GENERAL COUNSEL'S EXHIBIT 9\***

**MEETING OF FIBREBOARD, EMERYVILLE PLANT  
and**

**LU 1304 U.S. of A.—A.F.L.-C.I.O.  
Subject—Contract Negotiations**

July 30, 1959

/s/ Wm. F. Stumpf, United Steelworkers of A.  
/s/ Arthur R. Hellender, Central Labor Council  
/s/ Dave Arca, Pabco Committee  
/s/ Jack Griffin, Pabco Committee  
/s/ Lloyd Ferber, 1304  
/s/ Harry Bradford, Pabco Committee  
/s/ Harry Cunningham, Pabco Committee  
/s/ William Buhl, Pabco Committee  
/s/ Lincoln Beck, Pabco Committee

These representatives of /s/ Les Lountzen  
Fibreboard are not in at- /s/ Squire Fridell  
tendance for Contract Ne- /s/ R. C. Thumann  
gotiations but to restate /s/ Wm. Maffey  
their opinion that negotia- /s/ R. Baldwin, Jr.  
tions for a new contract  
would be pointless in view  
of management's intention  
to contract out powerhouse  
and maintenance work.

\* The original of this exhibit is handwritten. The various signatures are in ink. The note opposite the lower signatures is in pencil.

**GENERAL COUNSEL'S EXHIBIT 10****MAINTENANCE AGREEMENT**

The parties hereto

**FIBREBOARD PAPER PRODUCTS CORPORATION,**  
a Delaware corporation (herein called "Owner")

and

**FLUOR MAINTENANCE, INC.,**

a California corporation (herein called "Contractor")  
do hereby agree as follows:

1. *Term.* The term of this agreement shall commence as of midnight on July 31, 1959, and shall terminate at midnight on July 31, 1961; provided Owner shall have the right to terminate the same at any time upon sixty (60) days' prior written notice to Contractor, or upon any lesser period of notice if Owner shall pay the pro rata share of Contractor's fixed fee for sixty days after the giving of notice.

2. *Scope of the Work.* Contractor shall furnish all labor, supervision and office help required for the performance of maintenance work, operation of the boiler plant, and minor alteration and minor construction work at the Emeryville plant of Owner as Owner shall from time to time assign to Contractor during the period of this contract; and shall also furnish such tools, supplies and equipment in connection therewith as Owner shall order from Contractor, it being understood however that Owner shall ordinarily do its own purchasing of tools, supplies and equipment. Contractor shall provide a minimum of one superintendent and one office employee, and a basic maintenance crew sufficient to perform the day-to-day maintenance work at said plant, and such work force shall be expanded or contracted from time to time to meet the requests of Owner. It is one of the important inducements to Owner to enter into this contract that Contractor shall ordinarily be able to make such changes on a few hours' notice.

3. *Facilities to be Provided by Owner.* Owner shall assign to Contractor a designated central shop area, office space, locker room, and sanitary facilities at the Emeryville plant. Contractor shall have the right to use all tools and equipment in such areas and such other tools and equipment as Owner shall provide. Contractor shall make written requests upon Owner for all other tools, supplies and equipment needed in

the performance of the work. Tools, supplies and equipment shall be furnished by Contractor only when requested by Owner.

4. *Contract Price.* The price to be paid by Owner to Contractor for the performance of the work hereunder shall be the amount of Contractor's reimbursable costs defined below, plus a fixed fee of \$2,250 per month.

5. *Reimbursable Costs.* Contractor's reimbursable costs hereunder shall be as follows:

(a) *Direct Labor.* Contractor's costs of salaries and wages for all craft labor, foremen, and general foremen engaged in the performance of the work, the cost to Contractor of all labor fringe benefits applicable thereto which are required by labor agreements, and all payroll taxes, e.g., FICA, SUI and FUI, levied or assessed against Contractor now or hereafter imposed by any governmental body and which are measured by salaries or wages of employees engaged in the performance of the work hereunder.

(b) *Supervision, Office Help and General Field Office Overhead.* Contractor's costs of salaries and wages of field supervisors and field office employees while engaged in the performance of the work hereunder; the pro rata share of vacation and sick leave and group insurance costs applicable thereto; all payroll taxes, e.g., FICA, SUI and FUI, levied or assessed against Contractor now or hereafter imposed by any governmental body which are measured by salaries or wages of employees engaged in such field supervision and office help operations; and the cost of subsistence, travel time and expense for temporary assignments when required.

(c) *General Field Expenses.* The field cost of utilities, telephone, telegraph, stationery, operating supplies and expendable field supplies when furnished by Contractor at the request of Owner and used by Contractor in performance of the work hereunder.

(d) *Supplies, Tools and Equipment and Outside Shop Work.* The cost to Contractor of such tools, supplies and equipment and of any outside shop work, when provided by Contractor at the request of Owner and used in the performance of the work hereunder. The title to any such items which are purchased by Contractor shall

be and remain in Owner. All items furnished on a rental basis shall be reimbursed at the rental cost thereof (including any insurance costs applicable to such rental) to Contractor if not owned by Contractor and, if owned by Contractor, at rental rates not in excess of the applicable published rental rates of the Associated Equipment Dealers, plus actual transportation costs to and from the job site.

(e) *Insurance.* The cost to Contractor of workmen's compensation insurance applicable to reimbursable wages and salaries. No other costs of Contractor's insurance shall be reimbursable hereunder.

(f) *Permits, Licenses and Fees.* The cost to Contractor of permits, licenses and license fees directly applicable to Contractor's performance of work hereunder.

All necessary head office supervision and services shall be supplied by Contractor but no head office costs of Contractor shall be reimbursable hereunder except those listed in subparagraphs (c) and (f) of this paragraph, and no field office expenses not expressly listed above shall be reimbursable except when approved in advance by Owner.

6. *Independent Contractor.* All work hereunder shall be performed by Contractor as an independent contractor and Contractor shall have full, complete and exclusive control over its employees and shall direct and control all means and methods by which the work hereunder shall be performed.

7. *Insurance.* Contractor shall be named as an additional insured on the following policies of Owner up to the following limits with respect to loss or liability incurred by Contractor in the performance of the work hereunder.

Comprehensive bodily liability insurance, including motor vehicle bodily injury liability insurance:

Each person .....	\$5,000,000
Each occurrence .....	\$5,000,000

Comprehensive property damage insurance:

Motor vehicle—each occurrence .....	\$5,000,000
All other—each occurrence .....	\$5,000,000

Such policies shall contain the provision that the same shall not be cancelable except upon ten (10) days' prior written notice to Contractor, and Owner shall provide Contractor with certificates of such coverage.



8. *Waiver of Subrogation.* All fire and extended coverage policies of each party with respect to its property at the Emeryville plant site shall contain provisions permitting waiver of subrogation against the other party and, each of the parties releases the other and the employees, agents, representatives, contractors and subcontractors of the other from all liability for the loss or destruction of or damage to any of such property of the releasing party, caused by fire or extended coverage risks, and risks covered by standard boiler and machinery direct damage policies, and whether or not caused by the negligence of any person so released.

9. *Inspection of Books.* Owner shall have the right to inspect the books and records of Contractor at all reasonable times and to have the same audited at any time by auditors designated by Owner, to whatever extent may be required to determine the correctness of reimbursable items of cost hereunder.

10. *Terms of Payment.* Contractor shall submit a monthly invoice not later than the tenth day of each month setting forth all items of reimbursable cost incurred during the preceding calendar month, and its monthly fixed fee, together with such supporting documents as Owner may reasonably require, and such invoice shall be due and payable by Owner not later than ten (10) days after presentation.

11. *Force Majeure.* Either party shall be excused for failing to perform any obligation hereunder to the extent that its failure may result from causes beyond its reasonable power and control, and Contractor may suspend performance whenever and so long as there exists an unreasonable risk of liability of Contractor to third persons not covered by insurance.

12. *Non-assignability; Subcontracting.* This contract shall not be assignable in whole or in part by Contractor, nor shall any of the work be performed by subcontractors, without the prior written consent of Owner.

13. *Entire Agreement.* This contract sets forth the entire agreement between the parties.

IN WITNESS WHEREOF, the parties have executed this agreement as of the 1st day of August, 1959.

FIBREBOARD PAPER PRODUCTS CORPORATION

**GENERAL COUNSEL'S EXHIBIT 11****FIBREBOARD PAPER PRODUCTS CORPORATION**

Executive Offices • 475 Brannan Street  
San Francisco 19, California

**TO ALL EMERYVILLE-EMPLOYEES** July 30, 1959

Nearly every month the cost of manufacturing the products of American industry shoots up another couple of percentage points. In most industries, and Fibreboard is no exception, stiff competition makes it impossible to pass on these higher costs through increased prices. This "cost-price" squeeze has forced many companies, and again Fibreboard is no exception, to face the economic facts of life and control costs efficiently all along the line.

This cost control is vital to us at Fibreboard because it is one of the few ways to assure the company and its more than 6,000 employees a future of greater prosperity through more efficient service to its customers.

Here at Emeryville, the cost of doing maintenance work has grown steadily. Studies during the past two years have shown that maintenance of our facilities by an outside crew instead of by our own employees, would produce savings that would reduce the cost of our Emeryville products and make them more competitive.

Each of us is acutely aware of the implications of a decision to take this action. We have reached this decision only after long and careful study of all of the facts.

We are confident that maintenance employees affected by this action—who are members of highly skilled and specialized trades—will have little difficulty in finding new jobs in this time of great demand for skilled labor.

Fortunately, some of the employees affected will be able to share immediately in retirement benefits, which will provide them right away with some continuing income.

Additionally, we have prepared a program of termination allowances which would be distributed on a basis of length of service. For those who will share in retirement benefits, this

termination allowance would be an added contribution to their income.

J. P. CORNELL, Manager  
Emeryville Floor Covering Plant  
E. W. TORBOHN, Manager  
Emeryville Insulation Plant  
W. L. MAFFEY, Works Engineer  
Emeryville Utilities Group  
E. J. VAUGHT, Manager  
Emeryville Paint Plant  
S. F. FRIDELL, Manager  
Emeryville Roofing Plant &  
Felt Mill

### GENERAL COUNSEL'S EXHIBIT 12

July 31, 1959

Inasmuch as we have contracted out all powerhouse and maintenance work, we will no longer need your services. Here is the pay check due today and you will receive through the mails a termination allowance as shown on the personal statement memo.

Your pay check for this week will either be given to you at the close of the shift today or put in the mail tonight.

### GENERAL COUNSEL'S EXHIBIT 13

#### PERSONAL STATEMENT FOR MR. \_\_\_\_\_

Earned Vacation Due \$ \_\_\_\_\_

Pro rata Vacation Granted (1/12-12/12) \_\_\_\_\_

Termination Allowance (\_\_\_\_ weeks, which in-

cludes two (2) weeks' pay in lieu of notice) \_\_\_\_\_

Total \$ \_\_\_\_\_

#### PENSION STATUS

Estimated Monthly Retirement Income

1. As of August 1, 1959 \$ \_\_\_\_\_

2. At Normal Retirement (age 65) \_\_\_\_\_

Death Benefit \$ \_\_\_\_\_

Vested Interest: Yes \_\_\_\_\_ No \_\_\_\_\_

Deposits and Interest as of December 31, 1958 \$ \_\_\_\_\_

#### HOSPITAL/MEDICAL/LIFE INSURANCE COVERAGE

You have thirty-one (31) days in which to convert your group

coverage to an individual basis. During this period, your present coverage will remain in effect.  
Please contact the Personnel Office if you have any questions.

### **GENERAL COUNSEL'S EXHIBIT 14**

#### **NOTICE TO MEDIATION AGENCIES**

May 26, 1959

To: Regional Office: **FEDERAL MEDIATION AND CONCILIATION SERVICE**; and

To: **STATE DEPARTMENT OF INDUSTRIAL RELATIONS**  
You are hereby notified that written notice of the proposed termination or modification of the existing collective bargaining contract was served upon and a dispute exists with the other party to this contract.

1. (a) Name of employer: **FIBREBOARD PAPER PRODUCTS CORPORATION**

Address of establishment affected: 64th and Rollis Streets, Emeryville California. (b) Employer Official to communicate with: **R. C. THUMANN**, Director of Industrial Relations. Address: above.

2. (a) International union: **UNITED STEELWORKERS OF AMERICA**, Local 1304, AFL-CIO: x, Phone No: OL 4-2660

Address of local union: 3637 San Pablo Ave., Emeryville, California. (b) Union Official to communicate with: **LLOYD FERBER**, Business Agent.  
Address:

3. Number of employees in bargaining unit or units in the negotiations: 56.

4. Nature of business of establishment affected:

(a) Principal products or services rendered: Roofing, Paints, Etc. (b) Type of establishment: Manufacturing.

5. (a) Expiration date of contract: 7/31/59. (b) Contract date reopening: 5/26/59

6. Name of official filing this notice: **WM. F. STUMPF**. Title: Representative. Address: 610 16th St., Oakland 12, California. Phone No: TI 3-5466

Check on whose behalf this notice is filed:  
Union                      Employer

Signature: **WM. F. STUMPF**

(Attach copies of any statement you wish to make to the Mediation Agencies.)

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
[Caption Omitted]**

**REQUEST FOR ORAL ARGUMENT**

The respondent FIBREBOARD PAPER PRODUCTS CORPORATION hereby requests permission to argue the above entitled matter orally before the Board in the event that the Board should grant the petitions for reconsideration presently under submission. This request is based upon the following:

On March 29, 1961, the Board, Member Fanning dissenting, made and issued its decision dismissing the Complaint.

On May 17, 1961, the charging party filed a Petition for Reconsideration, and on May 23, 1961, respondent filed its answer thereto. On June 7, 1961, General Counsel filed a Motion for Consideration and Clarification, and on June 13, 1961, respondent filed its answer thereto. The Board has not yet ruled on either the said petition or the said motion.

As pointed out in respondent's answers to the Petition for Reconsideration and Motion for Consideration, Member Fanning's dissent indicated that he was laboring under certain factual misapprehensions. Oral argument would be of value in removing any such misapprehensions that may exist in his mind or in the minds of new members of the Board.

For the foregoing reasons, we submit that if the Board should decide to reconsider the case, oral argument should be had before rededecision of the merits.

Marion B. Plant  
BROBECK, PHLEGER & HARRISON  
Attorneys for Respondent  
Fibreboard Paper Products  
Corporation  
111 Sutter Street  
San Francisco 4, California

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
 [Caption Omitted]

**PETITION TO REOPEN RECORD FOR  
 THE INTRODUCTION OF FURTHER EVIDENCE**

The respondent **FIBREBOARD PAPER PRODUCTS CORPORATION** hereby petitions the Board, in the event that the Board should grant the requests for reconsideration presently under submission, to reopen the record in the above-entitled matter to allow respondent to introduce evidence pertaining to a reduction in the work force at respondent's Emeryville Plant. The evidence will show the following:

(1) Petitioner has ceased production of all floor covering materials except for a material called "Mastipave," Petitioner ceased production of printed floor covering in October 1960, ceased production of coating in May 1961, ceased production of linoleum in July 1961, and ceased production of compound in February 1962.

(2) Petitioner ceased the production of asphalt roofing at its Emeryville Plant in February 1962 and opened a new and modern plant for production of the same at Martinez, California. The only roofing operations still carried on at Emeryville are the production of felt and of granules.

(3) As a result of the foregoing changes, the number of production employees employed by petitioner at Emeryville has decreased from 737 on July 1, 1959, to 256 on July 1, 1962.

(4) As a result of the foregoing changes, the number of maintenance workers employed at Emeryville by the maintenance contractor has decreased to 37, and the number of maintenance workers performing work of a nature formerly performed by employees represented by the charging parties has decreased to 23. Because of impending completion of the work of demolishing facilities no longer in use, there will be further reductions within the next few days in the number of maintenance workers performing work of a nature formerly performed by employees represented by the charging parties.

(5) All of the foregoing changes which have oc-



curred were made, and those impending will be made, solely for business and economic reasons unrelated to the pendency of the instant proceedings, and are and will be permanent.

If the Board should decide to reconsider the case, and if such reconsideration should result in a decision that petitioner was guilty of a refusal to bargain, the said evidence will be pertinent to the question of the relief to be granted and particularly to the issues of reinstatement and back pay.

All of the said changes occurred subsequent to the hearing before the Trial Examiner in September 1959 and all but the cessation of production of printed floor covering occurred subsequent to the Board's original decision herein.

WHEREFORE, petitioner prays that in the event the Board grants the pending requests for reconsideration, the record be reopened and a further hearing had for the purpose of allowing petitioner to introduce the said evidence.

MARION B. PLANT  
BROBECK, PHLEGER & HARRISON  
By Marion B. Plant  
GERARD D. REILLY  
REILLY & WELLS  
By Gerard D. Reilly

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
[Caption Omitted]

**OPPOSITION TO PETITION TO REOPEN RECORD  
FOR THE INTRODUCTION OF FURTHER EVIDENCE**

The charging parties, East Bay Union of Machinists, Local 1304 United Steelworkers of America, and United Steelworkers of America, respectfully request that the respondent's petition to reopen the record in this case be denied for the following reasons:

- (1) The only evidence which respondent wishes to introduce is that the number of its production employees has decreased since the hearing before the Trial Examiner. That information, even if true, would in no way affect the

Board's determination whether respondent has committed unfair labor practices, nor what type of remedy is appropriate. Such information is relevant only to the calculation of reinstatement dates and amounts of back pay due individual employees, in a compliance proceeding before the Regional Director subsequent to the Board's decision. NLRB Rules and Regulations, §§102.52-102.59.

(2) Respondent's proposed evidence deals with occurrences dating as far back as two years ago, and, at their most recent, five months ago, yet respondent has not seen fit to bring them to the Board's attention until now. We respectfully submit that to reopen the record at this late date would serve no purpose but to delay resolution of this case, already several years old, and thereby further postpone granting of such relief as the Board may ultimately determine is appropriate.

WHEREFORE, the charging parties pray that respondent's petition to reopen the record be denied.

DAVID E. FELLER

ELLIOT BREDHOFF

MICHAEL H. GOTTESMAN

Feller, Bredhoff & Anker

1001 Connecticut Avenue, N. W.

Washington 6, D. C.

By David E. Feller

JAY DARWIN

IRWIN LEFF

Darwin, Rosenthal & Leff

68 Post St.

San Francisco, California

[fol. 171] [File endorsement omitted]

**IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17275

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EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, and UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,  
FIBREBOARD PAPER PRODUCTS CORPORATION, Intervenor.

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No. 17468

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FIBREBOARD PAPER PRODUCTS CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,  
EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, and UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, Intervenor.

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On Petitions To Review and Cross-Petition For Enforce-  
ment Of A Decision And Order Of The National Labor  
Relations Board

OPINION—Decided July 3, 1963

[fol. 172] Mr. Jerry D. Anker, with whom Messrs. David  
E. Feller, Elliot Bredhoff, and Michael H. Gottesman were  
on the brief, for petitioners in No. 17275 and intervenors in  
No. 17468.

Mr. Marion B. Plant, with whom Mr. Gerard D. Reilly was on the brief, for petitioner in No. 17468 and intervenor in No. 17275.

Mr. Melvin J. Welles, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom Messrs. Stuart Rothman, General Counsel at the time of argument, Dominick L. Manoli, Associate General Counsel, and Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent. Mr. Herman Levy, Attorney, National Labor Relations Board, also entered an appearance for respondent.

Before DANAHER, BASTIAN and BURGER, Circuit Judges.

BURGER, Circuit Judge: These are consolidated petitions for review of an order of the National Labor Relations Board. Cross motions for intervention have been granted. In response, the Board seeks enforcement of its order.

Fibreboard Paper Products Corporation, petitioner in No. 17468, is engaged in the manufacture, sale and distribution of paint, industrial insulation, floor covering and related products, operating twenty plants in five states. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, petitioner in No. 17275, until the events described below, had been the exclusive bargaining agent of the unit of maintenance employees at Fibreboard's Emeryville, California, plant.<sup>1</sup> The Union [fol. 173] and the Company had had a history of collective bargaining dating from 1937. At the time of the events relevant to this case, the parties had a one year collective bargaining agreement terminating July 31, 1959. The contract provided for automatic renewal for another year unless one of the contracting parties gave sixty days notice of a desire to modify or terminate the contract. On May 26, 1959, the Union gave such a notice and sought to arrange a bargaining session with Company representatives. The Company was not cooperative in arranging a meeting and

<sup>1</sup> The employees, in the unit included maintenance mechanics, electricians and helpers, working foremen, firemen and engineers employed in the powerhouse, and the storekeeper in the central supply and storeroom.

the representatives of the Company and the Union did not meet until July 27.

During the period when the Union was seeking to negotiate a new contract, the Company was considering contracting out its maintenance work to an independent contractor. By July 27, four days before the end of the contract term and approximately two months after the Union's notice, the Company had decided to contract out all its maintenance work then being performed by 73 men. A meeting with representatives of the Union was arranged the afternoon of that day. At this meeting the Union agents were handed copies of a letter from the Company which stated in pertinent part:

For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.

In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

No negotiations were attempted during the remainder of that meeting. On July 30 another meeting was held at the Union's request for the purpose of bargaining about a new contract. At that time the Company representatives restated their position that they were not prepared to negotiate with the Union on the question. On July 31, the employment of the 73 maintenance workers, including 50 represented by the Union, was terminated and employees of the subcontractor went on the job.

The Union filed charges against the Company and the Board's Regional Director issued a complaint alleging violations of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Labor Act. 29 U.S.C. §§ 158(a)(1), 158(a)(3), 158(a)(5). Hearings were held and the Trial Examiner filed his Intermediate Report recommending dismissal of the complaint. The Board accepted the Examiner's recommendations and dismissed the complaint. 130 NLRB 1558. The

General Counsel and the charging Union filed petitions for reconsideration which were granted. On reconsideration, the Board modified its original decision to the extent of finding that the Company had violated Section 8(a)(3) "by unilaterally subcontracting its maintenance without bargaining with the . . . [Union] over its decision to do so." The Board issued an appropriate cease and desist order in light of its findings and in addition, affirmatively ordered the Company to restore its maintenance operations and offer reinstatement with back pay to the displaced employees. The Board ordered that back pay be calculated from the date of the Board's supplemental decision and order to the date of the Company's offer of reinstatement to the employees in question. The Supplemental Decision and Order did not modify the original decision with respect to the dismissal of the charges under 8(a)(1) and 8(a)(3). 138 NLRB No. 67.

In its petition for review, the Company argues that (a) it had no duty to bargain about its decision to contract out the maintenance work performed by a unit of approximately 73 employees; and (b) there was no appropriate finding that it refused to bargain about its decision to contract out and that any such finding would not be supported by substantial evidence on this record. The Union [fol. 175] challenges (a) the Board's failure to find a violation of Section 8(a)(3) and (b) the Board's failure to make the remedial order of back pay operative to the date of termination of employment.

(1)

The record clearly shows that the Company met with the Union to announce that it had decided to contract out the maintenance work, and that it would not bargain on this decision. This position was consistent with the Company's belief that contracting out was exclusively a "management prerogative" about which it could take unilateral action without first bargaining to impasse with the Union. The Board's opinions indicate that a finding of refusal to bargain was made by the Board. There is substantial evidence to support the Board's conclusion that the Company refused to bargain.



## (2)

The facts of this case present the situation where the implementation of a decision to contract out the maintenance work, prompted by economic motives, extinguished the entire collective bargaining unit by terminating the employment of all of the members in that unit. In its supplemental decision and order the Board held that Fibreboard was under a duty to bargain with the Union on the proposed subcontracting before it took unilateral action.

It is important to point out certain issues which are not raised by this appeal, in order to define the limits of the issue we are deciding. We are not asked to evaluate a proposal made by management during the course of bargaining to determine whether it relates to a mandatory subject of bargaining within the intendment of Section 8d of the Act, *National Labor Relations Board v. Borg-Warner*, 356 U.S. 342 (1958), nor are we asked to evaluate unilateral [fol. 176] action concerning conditions of employment taken during negotiations, *National Labor Relations Board v. Katz*, 369 U.S. 736 (1962); we are not asked to evaluate the propriety of unilateral action taken after negotiations have reached an impasse, *National Labor Relations Board v. Intercoastal Terminal Inc.*, 286 F.2d 954 (5th Cir. 1961), nor are we asked to resolve issues relating to the scope of an arbitration clause in a collective bargaining agreement, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

Here the Company did not acknowledge that collective bargaining was essential as a preliminary to terminating the employment of an entire bargaining unit, nor did the employer bargain to impasse before taking unilateral action of contracting out all of the plant's maintenance work. Thus we are faced with the employer's contention that he was under no legal duty to bargain with the Union prior to contracting out the maintenance work. If the employer had the right unilaterally to terminate the employment of all employees making up a bargaining unit by contracting out the work, there would, of course, be no point in bargaining for a renewal of the existing contract. The work performed by its former employees would be performed by employees of a subcontractor.

The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580-81 (1960). By guaranteeing employee participation in decisions relating to wages, hours, terms and conditions of employment, Congress made a determination that this would create an environment conducive to industrial harmony and eliminate costly industrial strife which interrupts commerce.

[fol:177] In framing Section 8(d) of the Act, 29 U.S.C. § 158(d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively. The statutory definition of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment. The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions. Congress left it to the Board, in the first instance, to give content to the statutory language, subject to review by the courts. *Richfield Oil Corp. v. National Labor Relations Board*, 97 U.S.App.D.C. 383, 231 F.2d 717, cert. denied, 351 U.S. 909 (1956).

The employer's contention in essence is that its unilateral action was justified because it was motivated solely by economic necessity and that the Board's rejection of the Union's Section 8(a)(3) claims shows the absence of any anti-union animus. But the Board's final conclusions do not rest on a basis of improper motivation. It is not necessary to find an anti-union animus as a predicate for a conclusion that the employer violated Section 8(a)(5) which commands good faith bargaining on wages, hours and terms and conditions of employment. It is enough that management's reasons for its proposal might have been deemed satisfactory by and have been acceptable to the

Union. It is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly. By way of illustration: the union, after hearing management's side of the problem, might [fol. 178] concede the justice of the claims and agree to invoke union discipline to increase productivity and reduce costs. Specifically it might proffer a six months trial period in which either productivity would be increased with the existing force of 73 men or maintained with a reduced force to effect the economies desired by management.<sup>2</sup> It has been so often pointed out that no citation is called for that the obligation to bargain is not an obligation to agree. The basic concepts underlying the Labor Management Relations Act call for utilization of joint efforts at the bargaining table as a substitute for labor strife.

Having in mind the broad powers conferred on the Board by Congress and our limited scope of review, we conclude on this record that the Board was warranted in its determination that the employer violated Section 8(a)(5) by refusing to bargain before terminating the employment of all the members of its maintenance force.

(3)

The General Counsel's case in support of the Section 8(a)(3) charge rested on proof of overt acts from which it sought to persuade the Board to draw inferences of anti-union animus. The evaluation of such evidence is a process peculiarly within the seasoned experience of the Board and we see no basis for disturbing its finding that no Section 8(a)(3) violation was proven.

(4)

Finally the Union challenges the Board's action in dating the back pay remedy only from the date of the Board's

<sup>2</sup> Paradoxically the employer concedes that it would have been interested in possible solutions which the union might have offered but its course of action foreclosed negotiation at the threshold.

[fol. 179] Supplemental Decision and Order. The Union relies on *A.P.W. Products, Inc.*, 137 NLRB No. 7, enforced, — F.2d — (2d Cir. 1963). We think it sufficient to point out that in that case it was the Board which chose to modify its longstanding practice with regard to tolling of back pay between the Intermediate Report favorable to an employer and a subsequent reversal by the Board, and the Court of Appeals enforced the order. In the present case the Board has framed what it deems to be an appropriate remedy and we see no basis to depart from the general rule of allowing the Board wide latitude in shaping remedies. See *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *Phelps-Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941); *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U.S. 533 (1943).

*The Board's order will be enforced.*

[fol. 180]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,275

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, and UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,  
FIBREBOARD PAPER PRODUCTS CORPORATION, Intervenor.

No. 17,468

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FIBREBOARD PAPER PRODUCTS CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,  
EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, and UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, Intervenor.

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On Petitions to Review and a Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

Before: Danaher, Bastian and Burger, Circuit Judges.

JUDGMENT—July 3, 1963

These cases came on to be heard on the record from the National Labor Relations Board, and on petitions to review and a cross-petition for enforcement of, the order of the National Labor Relations Board, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases will be enforced.

Pursuant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Curiam.

[fol. 181]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER EXTENDING TIME FOR FILING PETITION FOR REHEARING  
AND STAYING MANDATE—July 15, 1963

On consideration of appellant's motions to stay issuance of mandate pending filing of a petition for rehearing on or before July 31, 1963, and to extend the time for filing a petition for rehearing from July 18, 1963, to July 31, 1963, said motions being consented to by the parties, it is

Ordered that the motions be granted.

[fol. 182]

No. 17468

FIBREBOARD PAPER PRODUCTS CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,  
EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO and UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, Intervenors.

CLERK'S MEMORANDUM

7/27/63 25—Petitioner's Petition for Rehearing filed.



[fol. 183] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
Nos. 17,275 and 17,468

[Titles omitted]

Before: Danaher, Bastian, and Burger, Circuit Judges,  
in Chambers.

ORDER DENYING PETITION FOR REHEARING—  
September 27, 1963

On consideration of the petition of Fibreboard Paper  
Products Corporation for rehearing, it is

Ordered by the court that the aforesaid petition is hereby  
denied.

Per Curiam.

[fol. 184] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT  
No. 17275

EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, and UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,  
FIBREBOARD PAPER PRODUCTS CORPORATION, Intervenor.

No. 17468

---

FIBREBOARD PAPER PRODUCTS CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,  
EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, and UNITED STEEL-  
WORKERS OF AMERICA, AFL-CIO, Intervenor.

---

PROPOSED DECREE—Filed October 10, 1963.

Before: Danaher, Bastian and Burger, Circuit Judges.

This cause came on to be heard upon petitions of East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO and United Steelworkers of America, [fol. 185] AFL-CIO, (No. 17275) and Fibreboard Paper Products Corporation, (No. 17468) to review and modify an order of the National Labor Relations Board dated September 13, 1962, directed against Fibreboard Paper Products Corporation, Emeryville, California, its officers, agents, successors and assigns, and upon the Board answers and petition to enforce said order. The Court heard argument of respective counsel on April 29, 1963 and has considered the briefs and the transcript of record filed in this cause. On July 3, 1963, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's said order. In conformity therewith,

It Is Hereby Ordered, Adjudged and Decreed, by the United States Court of Appeals for the District of Columbia Circuit, that the said order of the National Labor Relations Board in said proceeding be, and it hereby is, enforced, and that Fibreboard Paper Products Corporation,

its officers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

John A. Danaher, Judge, United States Court of Appeals for the District of Columbia Circuit.

Warren E. Burger, Judge, United States Court of Appeals for the District of Columbia Circuit.

Walter M. Bastian, Judge, United States Court of Appeals for the District of Columbia Circuit.

[fol. 186] Certificate of Service (omitted in printing).

[fol. 192] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 193]

SUPREME COURT OF THE UNITED STATES

No. 610, October Term, 1963

FIBREBOARD PAPER PRODUCTS CORPORATION, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, et al.

ORDER ALLOWING CERTIORARI—January 6, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted limited to Questions 1 and 3 presented by the petition which read as follows:

"1. Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?"

"3. Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?"

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

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JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1963 <sup>4</sup>

No. ~~14~~ 14

FIBREBOARD PAPER PRODUCTS CORPORATION,  
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, EAST BAY  
UNION OF MACHINISTS, LOCAL 1304, UNITED  
STEELWORKERS OF AMERICA, AFL-CIO, and  
UNITED STEELWORKERS OF AMERICA, AFL-  
CIO,

*Respondents.*

**Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia Circuit**

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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. \_\_\_\_\_

FIBREBOARD PAPER PRODUCTS CORPORATION,  
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, EAST BAY  
UNION OF MACHINISTS, LOCAL 1304, UNITED  
STEELWORKERS OF AMERICA, AFL-CIO, and  
UNITED STEELWORKERS OF AMERICA, AFL-  
CIO,

*Respondents.*

## **Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

Fibreboard Paper Products Corporation prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the District of Columbia Circuit, entered on July 3, 1963.

### **OPINIONS BELOW**

The opinion of the Court of Appeals is not yet reported except at 47 CCH Labor Cases, par. 18,339; the opinion, along with the Court's judgment and decree, is reproduced in Appendix A hereto. The original Decision and Order of the National Labor Relations Board is reported at 130 NLRB 1558 and the Board's Supplemental Decision

and Order is reported at 138 NLRB 550. Both of the Board's decisions are reproduced in the record printed for the use of the Court below (Joint Appendix), nine copies of which are filed herewith.

### **JURISDICTION**

The judgment of the Court below was entered on July 3, 1963. On July 26, 1963, within the time allowed by order, a petition for rehearing was filed. On September 27, 1963, the petition for rehearing was denied. On October 10, 1963, the decree of enforcement was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1). The jurisdiction of the Court below and of the National Labor Relations Board rested on 29 U.S.C. Sec. 160.

### **QUESTIONS PRESENTED**

1. Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?

2. Did the Court below exceed its office as a court of review in attempting to remedy the failure of the National Labor Relations Board to state its findings and reasons or basis therefor by imposing a standard of conduct differing from that which the Board had prescribed and by supplying findings which the Board had not made?

3. Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?



4. Did the Board act erroneously or in excess of its powers (a) in denying Petitioner's request to reopen the record for evidence of events occurring since the hearing before the Trial Examiner bearing upon the question of what, if any, remedial order should issue, or (b) in modifying its original Decision and Order of Dismissal a year and one-half after issuance thereof without any excuse for the delay other than the fact that the four members of the Board who were qualified to participate in the case were equally divided?

#### **STATUTES INVOLVED**

Statutes involved in the case are Sections 8(a), 8(d), 10(c) and 10(d) of the National Labor Relations Act (29 U.S. Code Secs. 158(a), 158(d), 160(c), 160(d)), and Sections 5, 6(a), 8(b) and 10(e) of the Administrative Procedure Act (5 U.S. Code Secs. 1004, 1005(a), 1007(b), 1009(e)). Their text is set forth in Appendix B.

#### **STATEMENT**

Petitioner has a manufacturing plant at Emeryville, California.

Until August of 1959, Petitioner did its own maintenance work about the plant. Some of its maintenance employees were represented for purposes of collective bargaining by a local of the United Steelworkers of America (hereinafter called the Union, with which Petitioner had a contract (J.A. 46). The contract terminated on July 31, 1959 (J.A. 46, 61).

Petitioner had been concerned about the high cost of its maintenance work and had been studying the possibility of effecting savings by having the work done by a contractor specializing in plant maintenance (J.A. 57-58). In

early August, after notifying the Union of its intention, outlining a plan of severance pay for employees to be terminated and discussing the matter at some length with the Union's business agents and, later, its negotiating committee (J.A. 49-54), Petitioner entered into a contract with Fluor Maintenance Company for performance of the maintenance work by Fluor (J.A. 58). Its sole purpose in doing so was to effect savings in its maintenance costs (J.A. 57-60).

Thereafter, Petitioner was charged by the Union with certain unfair labor practices, including a refusal to bargain, and proceedings were had before the National Labor Relations Board.

#### **The Board's Original Decision.**

In his Intermediate Report, the Trial Examiner set forth the facts stated above, including an account of the correspondence and discussions between Petitioner and the Union (J.A. 49-54), and found that "the allegations of the complaint, as amended, that [Petitioner] had engaged in certain acts and conduct violative of Section 8(a)(1), (3) and (5) of the Act are not supported by substantial evidence" (J.A. 61). He recommended dismissal (*ibid.*).

The Board, in a decision issued March 29, 1961, adopted "the findings, conclusions and recommendations of the Trial Examiner" (J.A. 35). The Board specifically agreed with the Trial Examiner that Petitioner's "motive in contracting out its maintenance work was economic rather than discriminatory", that its maintenance employees "were validly terminated," and that it had satisfied its obligation to bargain about termination pay (J.A. 36).

The Board then noted a contention by General Counsel "that the Trial Examiner did not pass upon an issue of primary importance in this case," namely, whether Petitioner "was under a statutory duty to bargain about its decision to contract out the maintenance work" (J.A. 36), and the Board went on to discuss this question.

It was long-settled Board doctrine (see pp. 9-10, *infra*) that although an employer must bargain about measures such as termination pay (wages) or the provision of other work (tenure of employment), designed to ease the impact upon employees of a legitimate business decision to contract out work or to close or move a plant, he is under no duty to bargain about the decision itself. In conformity with that doctrine, the Board, with one dissent, held that the statutory language is not "so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort" (J.A. 38).

It dismissed the complaint (J.A. 39).

#### **The Board's Supplemental Decision and Order.**

Shortly after the decision there were certain changes in the membership of the Board, and both the Union and General Counsel moved for reconsideration. The Board did not act upon the motions until September 14, 1962, nearly a year and a half later, when a three-member Panel, one member dissenting, rendered the Supplemental Decision and Order here under review.

In the meantime, Petitioner had entirely discontinued the manufacture of certain products theretofore produced at Emeryville and had moved certain other manufacturing operations from Emeryville to a new and modern plant at

Martinez, California. As a result, the number of maintenance workers required at Emeryville had been reduced by more than half. Petitioner had filed a request that in the event that the Board should decide to reconsider, the record be reopened for the reception of evidence as to the foregoing facts for the reason that they would be "pertinent to the question of the relief to be granted and particularly to the issues of reinstatement and back pay" (J.A. 168-169). No action had been taken on this request.

In the Supplemental Decision and Order, the Panel simultaneously granted the Union's motion for reconsideration (J.A. 19), denied Petitioner's request to reopen the record (*ibid.*), and modified the original decision by holding that Petitioner had been under a duty to bargain about its decision to contract out its maintenance work (J.A. 20). It ordered Petitioner to resume performance of the maintenance operations and to reinstate the individuals formerly employed therein with back pay from the date of the order (J.A. 27).

The Panel did not disturb the Board's original holding that Petitioner had not violated Section 8(a)(1) or 8(a)(3) of the Act and had satisfied its obligation to bargain about termination pay. The sole ground of the order was that Petitioner had been under a duty to bargain about whether to contract out the work.

Regarding the nature and extent of the bargaining duty thus imposed, the Panel, quoting with approval a dictum in the then recently decided case of *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022, said (J.A. 20-21):

"Experience has shown . . . that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to

both sides. Business operations may profitably continue and jobs may be preserved. *Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. But it commands no less.*" (Emphasis supplied.)

Arguably, Petitioner had engaged in the prior discussion which "is all that the Act contemplates"; it had advised the Union of its intention to contract out the work (J.A. 49-50), had explained that its reason for doing so was to effect savings in maintenance costs (J.A. 53-54), had repeatedly offered to discuss any questions that the Union might have (J.A. 50, 53, 108), and had offered to entertain a proposal, which the Union did not see fit to make, that contracting be deferred to permit of further discussion (J.A. 54, 86). However, the question whether these discussions satisfied the Panel's concept of bargaining was one which was never explored. In its original decision, the Board confined itself to the question whether there was a duty to bargain and, holding that there was not, never reached or considered the question whether the discussions which had occurred satisfied the bargaining requirement which the Panel's decision later imposed. Nor did the Panel consider the question; it simply assumed, contrary to the fact, that the Board had previously found that Petitioner acted "without first negotiating with the duly designated bargaining agent over its decision to do so" (J.A. 19).<sup>1</sup>

### **The Decision of the Court of Appeals.**

Petitioner petitioned for review of the decision, and the Board cross-petitioned for enforcement. The Court below

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1. Thus the Panel began its discussion of the question whether there was a duty to bargain with a characterization of the Board's original decision as having held what is quoted in the text (J.A. 19). Throughout the decision, failure to negotiate was simply assumed.

granted the Board's request for enforcement. Rehearing was denied.

Upon the question whether Petitioner had been under a duty to bargain about its decision to contract out the work, the Court, referring to the 1947 revision of the Act, correctly stated:

"In framing section 8(d) of the Act, 29 U.S.C. § 158(d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively."

But the Court continued on without observing that those decisions had denied the existence of a duty to bargain about a decision to contract out work.<sup>2</sup> Nor did the Court mention any of the subsequent decisions of the Board and the courts, of which there have been a number, dealing with the question (see p. 10, *infra*).

The Court disposed of Petitioner's objection to the lack of findings with this simple statement:

"The Board's opinions indicate that a finding of refusal to bargain was made by the Board."

Proceeding then to impose a standard of conduct differing from that prescribed by the Board and supplying findings

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2. There had been two decisions prior to 1947: *Brown-McLaren Manufacturing Company*, 34 NLRB 984 (1941), and *Mahoning Mining Company*, 61 NLRB 792 (1945). In the case last cited, the Board, in reversing a trial examiner's finding of a refusal to bargain, had declared:

"Since changing conditions in industry necessitate revision of bargaining units which will best effectuate the policies of the Act, the Board has never held that once it has established an appropriate unit for bargaining purposes, an employer may not in good faith, without regard to union organization of employees, change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change." (61 NLRB at 803.)



which the Board had not made, the Court held that Petitioner had failed to "bargain to impasse before taking unilateral action" and had not afforded the Union "an opportunity to meet management's legitimate complaints that its maintenance was unduly costly."

In addition to the points considered in the Court's opinion, Petitioner had urged that the Panel acted erroneously and in excess of the Board's powers (1) in ordering that Petitioner resume performance of the maintenance operations and reinstate, with back pay to the date of the order, the individuals formerly employed therein, (2) in denying Petitioner's request that in the event of reconsideration the record be opened for evidence of changes which had occurred in Petitioner's operations since the hearing before the Trial Examiner, and (3) in failing to act upon the motions for reconsideration with reasonable dispatch.<sup>3</sup>

The Court did not mention any of these points.

#### **THE REASONS FOR GRANTING A WRIT**

- I. In Holding That Petitioner Was Under a Duty to Bargain Over Its Decision to Contract Out the Work, the Court Below Rendered a Decision Upon an Important Question of Federal Law Which Conflicts with Decisions of the Second, Seventh and Eighth Circuits and Which Has Not Been, but Should Be, Settled by This Court.**

Until approximately a year after its original decision in the instant matter, it was settled Board doctrine that an employer is not required to bargain about a decision, motivated by legitimate business considerations, to con-

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3. Petitioner also had urged that the Board had failed to give the notice required by Section 10(d) of the National Labor Relations Act (29 U.S.C. § 160(d)) and had failed to afford the opportunity for hearing which the provision for notice impliedly requires. See *Sims v. Greenc*, 161 F.2d 87 (3d Cir. 1947). This is a point which Petitioner will wish to argue if certiorari is granted.

tract out work or close or move his plant. *Brown-McLaren Manufacturing Company*, 34 NLRB 984 (1941); *Mahoning Mining Company*, 61 NLRB 792, 803 (1945); *Walter Holm & Company*, 87 NLRB 1169, 1172 (1949); *Celaneese Corporation of America*, 95 NLRB 664, 713 (1951); *Krantz Wire & Mfg. Co.*, 97 NLRB 971, 988 (1952). He was required to bargain about measures such as termination pay (wages) or the provision of other work (tenure of employment) designed to ease the impact of the decision upon his employees (see, e.g., *Walter Holm & Company*, *supra*; *National Gas Company*, 99 NLRB 273 (1952); *Brown Truck & Trailer Mfg. Co., Inc.*, 106 NLRB 999 (1953); *Bickford Shoes, Inc.*, 109 NLRB 1346 (1954); *California Footwear Co.*, 114 NLRB 765 (1955), *enf. in part*, 245 F.2d 886 (9th Cir. 1957)), but he was not required to bargain about the decision itself.

The foregoing doctrine had been approved by two courts of appeals (*NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Jays Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961)), and has recently been approved by a third (*NLRB v. Adams Dairy, Inc.*, 48 CCH Labor Cases par. 18,469 (8th Cir. 1963)).<sup>4</sup>

4. Also illustrative of the general understanding that the Act imposed no duty to bargain about a business decision such as the one here involved are cases such as *NLRB v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954); *NLRB v. Atkins Transfer Co., Inc.*, 226 F.2d 324 (6th Cir. 1955); *NLRB v. Drennon Food Products Co.*, 272 F.2d 23 (5th Cir. 1959); *NLRB v. R. C. Mahon Co.*, 269 F.2d 44 (6th Cir. 1959); and *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960), *cert. den.*, 366 U.S. 909, in which the legality of unilateral action in contracting out work or closing a plant was treated by both the Board and the courts as depending entirely upon the employer's motive. Neither the Board nor anyone else thought of contending that bargaining was required. See also cases such as *California Footwear Co.*, 114 NLRB 765 (1955), *enf. in part*, 246 F.2d 886 (9th Cir. 1957), in which the question was whether an employer who had moved his plant without consulting

And Congress had acquiesced therein through two general revisions of the Act, one in 1947 (61 Stat. 136) and the other in 1959 (73 Stat. 519), in which it had not seen fit to provide for a different rule.

Regarding the language of the Act, the court below said:

"The statutory definition of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment."

Patently, these are *not* the "broadest terms possible." Congress, if it had so desired, could have used language imposing by its terms a duty to bargain, not only about the subjects which it specified, but also about "the nature and extent of the employer's operations."

There is a significant difference between a question as to whether an employer shall carry on particular operations, and a question as to the wages, hours and conditions under which men are to be employed therein. It is the same difference as exists between a union demand that the employer bid upon or accept a particular commercial contract or order so as to insure continuous operation and a demand for supplemental unemployment benefits or for a guaranteed annual wage. The one does not deal with wages, hours or other terms or conditions of employment; the other does.

The line is one between measures dealing directly with wages, hours or conditions of employment and a business decision, which, while not dealing directly with any of those subjects, has consequential impact thereon. The decisions above cited recognized that the area in which an employer is required to bargain is not unlimited, and they fixed the limit at a point reasonably calculated to effectuate

the Union had refused to bargain over transfer of employees to the new location, and in which there was no suggestion that he had been under a duty to bargain about his decision to move the plant.

the Congressional language and purpose. Indeed, the decisions could not have gone further without holding that there is no limit, for it is impossible to conceive of a business decision having no impact upon wages, hours or other terms or conditions of employment. (See dissent of Member Rodgers from the Board's Supplemental Decision, J.A. 31.)

It was not until the case of *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022 (1962), enf. 316 F.2d 846 (5th Cir. 1963), decided approximately a year after its original decision in the instant case, that the Board announced a contrary view. There the employer had contracted out work and terminated his employees to avoid bargaining with a newly certified union; he therefore was guilty of violating both Sections 8(a)(3) and 8(a)(5) of the Act, and this was the ground upon which the Board's order later was enforced. However, because of the impact of the contract upon the tenure of employment of the company's employees, the Board said by way of dictum that even if there had been no improper motivation, "we would nevertheless find that Respondent violated Section 8(a)(5) by failing to fulfill its mandatory obligation to consult with the union regarding its decision to subcontract" and that to the extent that the Board's original decision in the instant case held otherwise, "it is hereby overruled." 136 NLRB at 1027-1028.

The Board has since applied the rationale of its *Town and Country* dictum in holding that an employer, though his motives are beyond reproach, must bargain about a decision to substitute a different type-setting process for that therefore employed (*Renton News Record*, 136 NLRB 1294 (1962)), about a decision to go out of business because of financial difficulties (*Lori-Ann of Miami*, 137 NLRB 1099

(1962)), and about a decision to sell a portion of his business (*Weingarten Food Center of Tenn., Inc.*, 140 NLRB No. 25, 1962 CCH NLRB Dec. par. 11,854 (1962)).

We are informed by the office of General Counsel that there are now pending before the Board at one stage or another 55 cases in which the complaints are based in whole or in part upon the above rationale; 29 involve contracting, 10 involve removal of operations to another location, 10 involve discontinuance of the business or a part thereof, and 6 involve sale of the business.

**Importance of the Question.**

The importance of the question whether an employer must bargain over a decision, prompted by legitimate business considerations, to contract out work is apparent. The problem arises daily.

But as illustrated by the Board's decisions last above cited, the rationale of an affirmative answer to that question extends far beyond the contracting out of work; it extends to every business decision having impact upon wages, hours or terms or conditions of employment. A decision to curtail or increase production, or to discontinue or change a particular product, or to substitute a new product, or to increase production of one product at the expense of another has such an impact. So does a decision to turn down an order or to refrain from bidding upon or accepting a particular job. In short, the decision of which review is sought means that the area in which an employer is required to bargain is without boundaries.

**Conflict with Second, Seventh and Eighth Circuits.**

The decision below was sandwiched between contrary decisions of the Seventh and Eighth Circuits and squarely

conflicts with those decisions as well as with an earlier decision of the Second Circuit.

The most recent of the decisions just mentioned was that of the Eighth Circuit in *NLRB v. Adams Dairy, Inc.*, 48 CCH Labor Cases, par. 18,469, decided September 12, 1963, approximately two months after the decision below. The Board had held the employer guilty of a refusal to bargain because of his action in contracting out the distribution of his products without consulting the union representing the employees theretofore engaged in that work. The Court, while holding that the employer was obligated to bargain "with reference to the treatment of the employees who were terminated by the decision" to contract out the work, held that he was not required to bargain about the decision itself. In the latter connection the Court cited with approval the Board's original decision in the instant case, referred to the decision of the Court below as "unpersuasive", and said:

"We hold here that the decision on the part of Adams to terminate a phase of its business and distribute all of its products through independent contractors was not a required subject of collective bargaining."

In *Jays Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961), decided after issuance of the Board's original decision in the instant case, the Court referred to that decision with approval and held that an employer who had contracted out its truck maintenance work without consulting the union had been under no duty to bargain about its decision to do so. The Court said:

"The Board's position in the case at bar is clearly inconsistent with its recent decision in *National Labor Relations Board v. Fibreboard Paper Products Corp.*, 130 N.L.R.B. No. 161, 47 L.R.R.M. 1547, 1549, decided



on March 27, 1961. In that case, the Board held that an employer did not violate the Act, by failing to bargain with a union that represented maintenance employees, concerning the employer's decision to contract out maintenance work, since such decision is not concerned with conditions of employment but with questions of whether an employment relationship shall exist. The Board held that an employer has no statutory obligation to bargain with a union concerning basic management decisions, such as whether, and to what extent, to risk capital and managerial effort . . ." 292 F.2d at 320.

In *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961), where an employer had moved his operations to another city without consulting the union, the Court reversed the Board's finding of improper motivation and held that although the employer had violated Section 8(a)(5) by failing to bargain with the union over transfer of its employees to the new location, it had been under no duty to consult with the union regarding the move itself, saying in this connection:

" . . . We are also of the opinion that, inasmuch as the move was made through a legitimate exercise of managerial discretion the issue of whether it was to be made need not have been submitted by respondents for discussion at the collective bargaining table under § 8(d) of the National Labor Relations Act, 29 U.S.C.A. § 158(d). However, we agree with the Board that the failure to give notice to the union of the move and failure to discuss the treatment to be accorded displaced employees was a violation of § 8(a)(5)." 293 F.2d at 172.

The Court later repeated:

"Was the failure to submit the move as a subject for bargaining a refusal to bargain with respect to rates of

pay, hours and conditions of employment? The decision to move was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion. However, once that decision was made § 8(a)(5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be radically changed by the move." 293 F.2d at 176.

#### **This Court's Decisions.**

This Court has never passed upon the question whether the National Labor Relations Act imposes a duty to bargain about a business decision such as that involved in the instant case. The Court's nearest approach to the problem was in *Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960), wherein it held that the Norris-LaGuardia Act precluded issuance of an injunction against a strike to force amendment of a bargaining contract to provide:

"No position in existence on December 3, 1957, will be abolished or discontinued except by agreement between the carrier and the organization." 362 U.S. at 332.

The decision was based upon the ground that the case presented a "labor dispute" within the meaning of the Norris-LaGuardia Act, which is to be broadly construed, and that the Union's demand was not rendered unlawful by the Railway Labor Act or any other federal statute.

To hold that the Norris-LaGuardia Act deprives a federal court of jurisdiction to enjoin a strike is not to hold that the demand in support of which the strike was called is one over which the employer must bargain. *Lauf v. Shinner*, 303 U.S. 323 (1938). As said in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 205 (1962), the Norris-

LaGuardia Act is not limited to the protection of collective bargaining.

Nor does the fact that a demand is lawful mean that it is one over which bargaining is required. *NLRB v. Borg Warner Corp.*, 356 U.S. 342 (1958).

The only thing in the Court's opinion that could possibly be taken to mean that the Railway Labor Act required bargaining over the union's demand was a brief statement by way of dictum that "the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes concerning rates of pay, rules and working conditions." 362 U.S. at 339. We refer to the foregoing as a dictum because applicability of the Norris-LaGuardia Act does not depend upon the existence of a duty to bargain over the subject in controversy (see *Sinclair Refining Co. v. Atkinson*, *supra*), and the question whether there was such a duty was not presented.

If the *Telegraphers* case were nevertheless to be regarded as holding that the Railway Labor Act imposes a duty to bargain over a legitimate business decision to close or move a plant or contract out a part of the operations, the fact would remain that it most certainly did not hold that any such duty is imposed by the National Labor Relations Act; the opinion did not touch upon the latter Act.

**II. The Court Below, in Imposing a Standard of Conduct Differing from That Which the Board Had Prescribed and in Supplying Findings Which the Board Had Not Made, Disregarded the Applicable Decisions of This Court as Well as Prior Decisions of Its Own; and in So Doing, It Imposed a Standard Which Was Erroneous.**

The entire answer of the Court below to our complaint that the Board never explored the question whether Peti-

tioner refused to bargain about its decision to contract out the work and never made any finding of such a refusal is contained in the following statement in the Court's opinion:

"The Board's opinions indicate that a finding of refusal to bargain was made by the Board."

The National Labor Relations Act requires that the Board "state its findings of fact" (29 U.S.C. §160(c)), and the Administrative Procedure Act requires that the decision "include a statement of findings and conclusions, as well as the reasons or basis therefor" (5 U.S.C. §1007(b)). A mere indication that a finding has been made does not satisfy the requirement of a finding; nor does it satisfy the requirement of a statement of the reasons or basis for the finding. *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 81 (1952); *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-511 (1935).

While the Supplemental Decision indicates that the reconstituted Board labored under the misapprehension that somewhere along the line a refusal to bargain had been found, this was just what we have termed it—a misapprehension. The only findings ever made on *any* of the issues were those contained in the Intermediate Report and adopted by the Board in its original decision (see pp. 4-5, *supra*). All were favorable to Petitioner.

#### **The Findings Supplied by the Court.**

The Court was of the opinion that Petitioner did not "bargain to impasse before taking unilateral action" in that the Union was not "afforded an opportunity to meet management's legitimate complaints that its maintenance work was unduly costly." These are the premises upon which its decision rests.

But the Board had made no such findings. Nor had the Board mentioned any such requirements. "... prior discussion," the Board had said, "is all that the Act contemplates."

In imposing a standard of conduct differing from that prescribed by the Board and in supplying findings which the Board had not made, the Court below did exactly that which this Court has repeatedly held should not be done. *Burlington Truck Lines v. U. S.*, 371 U.S. 156, 168-169 (1962); *Kelley v. Everglades Dist.*, 319 U.S. 415, 421 (1943); *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88 (1942).

#### **The Standard of Conduct Imposed by the Court.**

The Court's holding that unilateral action taken prior to a bargaining impasse constitutes, per se, a refusal to bargain is at variance with decisions of this Court and of other courts of appeal and, if permitted to stand, will result in mischief.

In *NLRB. v. Katz*, 369 U.S. 736 (1962), this Court held that unilateral action taken during negotiations but without first consulting the union constitutes a refusal to bargain, but, in so holding, it recognized that "there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the Union has rejected as too low" (369 U.S. at 745, n. 12). In the latter connection the Court referred to *NLRB v. Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951) and *NLRB v. Landis Tool Co.*, 193 F.2d 279 (3d Cir. 1952), each of which held guiltless of a refusal to bargain an employer who had unilaterally placed in effect a wage increase after advising the union of its intention to do so, but while negotiations were still in progress and before an impasse had been reached.

What renders unilateral action objectionable is, not absence of an impasse, but, omission of prior notice and consultation." Thus it was that the Board, in *Town and Country Manufacturing Co., supra*, and in the instant case, said that "prior discussion . . . is all that the Act contemplates." And this is why the Board, in discussing the remedy to be applied in the instant case, said that it would order Petitioner to refrain from "making unilateral changes in [employees'] terms and conditions of employment *without consulting their bargaining agent*" (J.A. 25; emphasis supplied).

If the Board is correct in its position that an employer must bargain about every business decision having an impact upon wages, hours or other terms or conditions of employment, and if the Court below is correct in its position that bargaining must reach an impasse before unilateral action may be taken, the pace at which an employer does business, or goes out of business, will be limited to the pace set in bargaining by the union or unions with which he deals. Furthermore, any unilateral action which he takes will be taken at the risk that his own concept of an impasse may differ in the particular case from that of the Board.

**III. The Order That Petitioner Resume Its Maintenance Operations and Reinstates the Individuals Formerly Employed Therein Is Both Novel and Mischievous; It disregards Applicable Decisions of This Court and Violates an Explicit Provision of the Act.**

This is the first instance in the history of the Act in which the Board has ordered reinstatement in a case involving only a refusal to bargain.<sup>5</sup> It also is the first instance in

5. In the past, the remedy for a refusal to bargain has been simply an order requiring bargaining. Thus, where an employer moving his plant violated his duty to bargain regarding placement of affected employees (tenure of employment), the employer was



which the Board has ordered the resumption of operations which, for any reason, good or bad, have been discontinued.<sup>6</sup>

While its novelty does not of itself condemn the remedy, the fact that it took the Board twenty-seven years to discover it invites a scrutiny which the Court below failed to give it.<sup>7</sup>

As for the importance of the question whether this kind of an order is proper in a case such as the present, the decision means that no matter what discussions the employer may have had with the union or unions affected, no business decision can be effectuated except at the risk that some years later<sup>8</sup> what has been done will be ordered undone

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ordered only to bargain regarding such placement (see, e.g., *Brown Truck & Trailer Mfg., Inc.*, *supra* p. 10) and sometimes even this remedy was denied (see, e.g., *Bickford Shoes, Inc.*, *supra* p. 10). Even after its dictum (quoted in the text, *infra* p. 22) in *Town & Country Manufacturing Co.*, the Board, in *Renton News Record*, *supra* p. 12, declined to require the employer to resume its discontinued type-setting operations and reinstate the individuals who had been employed therein for the reason that such an order would be "punitive" (136 NLRB at p. 1298). See also *Lori-Ann of Miami*, *supra* p. 12, where the employer was ordered only to bargain.

6. Even where the discontinuance of operations was itself "discriminatory" and violative of Section 8(a)(3) of the Act, it was the Board's practice, not to order resumption of the operations, but to order only that the terminated employees be placed upon a preferred list for reemployment in the event of a voluntary resumption of the operations. See, e.g., *New Madrid Manufacturing Co.*, 104 NLRB 117 (1953), enf. granted in part and den. in part, 215 F.2d 908 (8th Cir. 1954); *Barber's Iron Foundry*, 126 NLRB 30 (1960); *M. Yoseph Bag*, 128 NLRB 211 (1960), 139 NLRB No. 108 (1962). In *Darlington Manufacturing Co.*, 139 NLRB No. 23 (1962), which was decided after *Town and Country Manufacturing Co.* and in which a plant had been closed in violation of Section 8(a)(3), the Board did not order that the plant be reopened, but ordered only that the employees who had been terminated be placed upon preferred lists for employment at other plants.

7. The Court, while considering the Union's objections to the order, made no mention of the fact that Petitioner had objected thereto.

8. Cases decided by the Board in 1958 involved an average elapsed time of nearly one and one-third years (465 days) between issuance of the complaint and rendition of the Board's decision and

because of failure of the discussions to conform in some respect, to the Board's notion of good faith bargaining or because of the choice made by the Board between conflicting versions of what was said.

**Applicable Decisions of this Court.**

In justification of its order, the Panel, quoting with approval from its *Town and Country* opinion, said:

*"Since the loss of employment stemmed directly from their employer's unlawful action in by-passing their bargaining agent, we believe that a meaningful bargaining order can be fashioned only by directing the employer to restore his employees to the position which they held prior to this unlawful action" (J.A. 25; emphasis supplied).*

The order thus was based, in part at least, upon an assumption that the loss of jobs resulted from Petitioner's supposed refusal to bargain—i.e., that bargaining would have resulted in abandonment by Petitioner of its plan to contract out the work.

There was no more warrant for the foregoing assumption than there was for a similar assumption which caused this Court to overturn a Board order in the completely analogous case of *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).<sup>9</sup> The order is punitive rather than remedial

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almost two and one-half years between issuance of the complaint and a court decree enforcing or setting aside the Board order. *Report of Advisory Panel on Labor-Management Relations Law to the Senate Committee on Labor and Public Welfare*, Sen. Doc. No. 81, 86th Cong., 2nd Sess., p. 10 (1960). In the present case, the elapsed time between issuance of the complaint and rendition of the Supplemental Decision was approximately three years. It has now been more than four years since the complaint was issued.

9. An order that the employer cease giving effect to certain contracts with the International Brotherhood of Electrical Workers was vacated by this Court because based upon the "unwarranted assumption" that "the contracts were the fruit of the unfair labor practices" (305 U.S. at 238).

and for this reason, if for no other, exceeded the Board's powers. *Consolidated Edison Co. v. NLRB*, *supra*; *Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940). The Board itself recognized the punitive character of such an order in *Renton News Record*, *supra*, page 12.

Speculation that bargaining would have had one outcome rather than another is, we submit, not a proper basis for a Board order.

**Conflict with Section 10(c) of the Act.**

Furthermore, the order violates the Act's express prohibition of compulsory reinstatement of employees terminated for cause (see Sec. 10(c), 29 U.S.C. Sec. 160(c)). As shown by the legislative history (93 Cong. Rec. 6518 (1947)), that provision was designed to limit the Board's power of reinstatement to cases involving discharges for "union activity"—that is, discharges violative of Sections 8(a)(1) and 8(a)(3) of the Act; the word "cause" was not used as a mere synonym for "misconduct," but was intended to embrace any legitimate reason, including a reduction in force motivated by legitimate business considerations. See *Shamrock Dairy, Inc.*, 280 F.2d 665, 666 (D.C. Cir. 1960), cert. den., 364 U.S. 892.

**IV. The Points Which the Court Below Failed to Consider Present Questions of Importance in the Administration of the Act; One Raises a Question Upon Which the Decision Below Conflicts with Applicable Decisions of This Court, and Another Raises Questions Which Have Not Been, but Should Be, Settled by This Court; in Their Inattention to These Questions, the Board and the Court Below Have So Departed from the Accepted and Usual Course of Administrative and Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.**

Although failing to mention them in its opinion, the Court below, in decreeing enforcement of the Board's order,

necessarily decided adversely to Petitioner, not only the questions raised by its objections to the order of reinstatement, but also two other questions which Petitioner had raised. Both are related to "those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature" (*Morgan v. United States*, 304 U.S. 1, 19 (1937), rehear. den., 304 U.S. 23). Both are important in the administration of the Act.

**The Board's Denial of Petitioner's Request to Reopen the Record.**

In justification of its order that Petitioner resume performance of the maintenance operations, the Panel said:

"We do not believe that requirement imposes an undue or unfair burden on Respondent. The record shows that the maintenance operation is *still* being performed in much the same manner as it was prior to the subcontracting arrangement." (J.A. 25, n. 19; emphasis supplied.)

How the record could possibly show this in view of the fact that it had been three years since the evidence was closed, the Panel did not explain. And almost in the same breath with the statement above quoted, it denied Petitioner's request that the record be reopened for evidence that the operation was *not* still the same—that Petitioner had permanently discontinued certain of its manufacturing operations and had moved others to a new plant in another city, with substantial effect upon the nature and extent of the maintenance work at Emeryville.

The reason given for denying the request was that "the issues raised therein are basically matters which are more properly treated at the compliance stage of the proceedings" (J.A. 19).

But the evidence dealt with a question which the Panel did *not* postpone to the compliance stage of the proceedings

but treated in its decision—namely, the question whether an “undue or unfair burden” would be imposed upon Petitioner by an order that it turn back the clock three years.

Furthermore, the Panel’s failure to phrase its order in the light of that evidence places Petitioner in a quandary as to what is required of it. Arguably, the requirement that Petitioner resume its maintenance operations as formerly conducted by it at Emeryville embodies a requirement that it resume, at Emeryville, manufacturing operations which have been permanently discontinued or moved to a new plant in another city. And if the order does not require this, then, arguably, it requires that employment be offered at the new plant. In leaving to compliance proceedings the question whether Petitioner is required to resume operations which have been discontinued or moved elsewhere, or to offer employment at the new location, the order places Petitioner in peril of being adjudged in contempt for wrong answers to those questions. This Court has repeatedly held that a Board order should not leave for determination in compliance proceedings questions such as these. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *J. I. Case Company v. NLRB*, 321 U.S. 332 (1944); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

**The Board’s Failure to Act with Reasonable Dispatch.**

Section 6(a) of the Administrative Procedure Act required that the Board “proceed with reasonable dispatch” (5 U.S.C., Sec. 1005(a)). The only apparent reason for the delay of a year and one-half in acting upon the motions for reconsideration was that the Board as reconstituted was equally divided.<sup>10</sup> This was not a good reason for delay.

10. New member Brown was disqualified because he, as a regional director, had issued the complaint (see 5 U.S.C. sec. 104(c)).

but a bad one. The universal practice of reviewing courts and of administrative agencies when the membership of the court or agency is equally divided upon the matter before it, is to deny relief from the order or decision under attack. 5B C.J.S. Appeal-Error, Sec. 1844(b). This has been the procedure heretofore followed by the Board itself. See, e.g., *Shamrock Dairy, Inc.*, 124 NLRB 494, 501-502 (1959), aff'd 280 F.2d 665 (D.C. Cir. 1960), cert. den. 364 U.S. 892. The fact that the Board was equally divided, therefore, should have meant reasonably prompt denial of the motions. If the Board preferred to break the deadlock by referring the matter to a panel of three, this likewise should have been done promptly.

Because of the delay, if for no other reason, enforcement of the order should have been denied. The Act's purpose of assuring "that no agency shall . . . proceed in dilatory fashion to the injury of the persons concerned" (Senate Document No. 248, 79 Cong., 2d Sess., 1946, p. 264) would be defeated if the only remedy for unreasonable delay were a proceeding to compel action after the delay has occurred.

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Members Rogers and Leedom had joined in the original decision and later dissented in *Town and Country Manufacturing Co.* Member Fanning had dissented from the original decision and was joined by the new Chairman, McCulloch, in the *Town and Country Manufacturing Co.* decision.



**CONCLUSION**

We respectfully submit that this petition for certiorari should be granted.

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**(Appendices Follow)**

## **Appendix A**

*United States Court of Appeals  
for the District of Columbia Circuit*

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No. 17275

EAST BAY UNION OF MACHINISTS, LOCAL 1304,  
UNITED STEELWORKERS OF AMERICA, AFL-CIO, and  
UNITED STEELWORKERS OF AMERICA, AFL-CIO,

*Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*  
FIBREBOARD PAPER PRODUCTS CORPORATION, *Intervenor*

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No. 17468

FIBREBOARD PAPER PRODUCTS CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*  
EAST BAY UNION OF MACHINISTS, LOCAL 1304,  
UNITED STEELWORKERS OF AMERICA, AFL-CIO, and  
UNITED STEELWORKERS OF AMERICA, AFL-CIO,

*Intervenor.*

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On Petitions to Review and Cross-Petition for Enforcement  
of a Decision and Order of the National  
Labor Relations Board

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Decided July 3, 1963

*Mr. Jerry D. Anker*, with whom *Messrs. David E. Feller, Elliot Bredhoff*, and *Michael H. Gottesman* were on the brief, for petitioners in No. 17275 and intervenors in No. 17468.

*Mr. Marion B. Plant*, with whom *Mr. Gerard D. Reilly* was on the brief, for petitioner in No. 17468 and intervenor in No. 17275.

*Mr. Melvin J. Welles*, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Stuart Rothman*, General Counsel at the time of argument, *Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent. *Mr. Herman Levy*, Attorney, National Labor Relations Board, also entered an appearance for respondent.

Before *DANAHER, BASTIAN and BURGER, Circuit Judges.*

*BURGER, Circuit Judge:* These are consolidated petitions for review of an order of the National Labor Relations Board. Cross motions for intervention have been granted. In response, the Board seeks enforcement of its order.

Fibreboard Paper Products Corporation, petitioner in No. 17468, is engaged in the manufacture, sale and distribution of paint, industrial insulation, floor covering and related products, operating twenty plants in five states. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO, petitioner in No. 17275, until the events described below, had been the exclusive bargaining agent of the unit of maintenance employees at Fibreboard's Emeryville, California, plant.<sup>1</sup> The Union and the Company had had a history of collective bargaining

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1. The employees in the unit included maintenance mechanics, electricians and helpers, working foremen, firemen and engineers employed in the powerhouse, and the storekeeper in the central supply and storeroom.

dating from 1937. At the time of the events relevant to this case, the parties had a one year collective bargaining agreement terminating July 31, 1959. The contract provided for automatic renewal for another year unless one of the contracting parties gave sixty days notice of a desire to modify or terminate the contract. On May 26, 1959, the Union gave such a notice and sought to arrange a bargaining session with Company representatives. The Company was not cooperative in arranging a meeting and the representatives of the Company and the Union did not meet until July 27.

During the period when the Union was seeking to negotiate a new contract, the Company was considering contracting out its maintenance work to an independent contractor. By July 27, four days before the end of the contract term and approximately two months after the Union's notice, the Company had decided to contract out all its maintenance work then being performed by 73 men. A meeting with representatives of the Union was arranged the afternoon of that day. At this meeting the Union agents were handed copies of a letter from the Company which stated in pertinent part:

For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.

In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

No negotiations were attempted during the remainder of that meeting. On July 30 another meeting was held at the Union's request for the purpose of bargaining about a new contract. At that time the Company representatives restated their position that they were not prepared to negotiate with

the Union on the question. On July 31, the employment of the 73 maintenance workers, including 50 represented by the Union, was terminated and employees of the subcontractor went on the job.

The Union filed charges against the Company and the Board's Regional Director issued a complaint alleging violations of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Labor Act, 29 U.S.C. §§ 158(a)(1), 158(a)(3), 158(a)(5). Hearings were held and the Trial Examiner filed his Intermediate Report recommending dismissal of the complaint. The Board accepted the Examiner's recommendation and dismissed the complaint. 130 NLRB 1558. The General Counsel and the charging Union filed petitions for reconsideration which were granted. On reconsideration, the Board modified its original decision to the extent of finding that the Company had violated Section 8(a)(5) "by unilaterally subcontracting its maintenance without bargaining with the . . . [Union] over its decision to do so." The Board issued an appropriate cease and desist order in light of its findings and in addition, affirmatively ordered the Company to restore its maintenance operations and offer reinstatement with back pay to the displaced employees. The Board ordered that back pay be calculated from the date of the Board's supplemental decision and order to the date of the Company's offer of reinstatement to the employees in question. The Supplemental Decision and Order did not modify the original decision with respect to the dismissal of the charges under 8(a)(1) and 8(a)(3). 138 NLRB No. 67.

In its petition for review, the Company argues that (a) it had no duty to bargain about its decision to contract out the maintenance work performed by a unit of approximately 73 employees; and (b) there was no appropriate finding that it refused to bargain about its decision to contract out and that any such finding would not be supported by substantial

evidence on this record. The Union challenges (a) the Board's failure to find a violation of Section 8(a)(3) and (b) the Board's failure to make the remedial order of back pay operative to the date of termination of employment.

## (1)

The record clearly shows that the Company met with the Union to announce that it had decided to contract out the maintenance work, and that it would not bargain on this decision. This position was consistent with the Company's belief that contracting out was exclusively a "management prerogative" about which it could take unilateral action without first bargaining to impasse with the Union. The Board's opinions indicate that a finding of refusal to bargain was made by the Board. There is substantial evidence to support the Board's conclusion that the Company refused to bargain.

## (2)

The facts of this case present the situation where the implementation of a decision to contract out the maintenance work, prompted by economic motives, extinguished the entire collective bargaining unit by terminating the employment of all of the members in that unit. In its supplemental decision and order the Board held that Fibreboard was under a duty to bargain with the Union on the proposed subcontracting before it took unilateral action.

It is important to point out certain issues which are not raised by this appeal, in order to define the limits of the issue we are deciding. We are not asked to evaluate a proposal made by management during the course of bargaining to determine whether it relates to a mandatory subject of bargaining within the intentment of Section 8d of the Act, *National Labor Relations Board v. Borg-Warner*, 356 U.S. 342 (1958), nor are we asked to evaluate unilateral action



concerning conditions of employment taken during negotiations, *National Labor Relations Board v. Katz*, 369 U.S. 736 (1962); we are not asked to evaluate the propriety of unilateral action taken after negotiations have reached an impasse, *National Labor Relations Board v. Intercoastal Terminal Inc.*, 286 F.2d 954 (5th Cir. 1961), nor are we asked to resolve issues relating to the scope of an arbitration clause in a collective bargaining agreement, *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

Here the Company did not acknowledge that collective bargaining was essential as a preliminary to terminating the employment of an entire bargaining unit, nor did the employer bargain to impasse before taking unilateral action of contracting out all of the plant's maintenance work. Thus we are faced with the employer's contention that he was under no legal duty to bargain with the Union prior to contracting out the maintenance work. If the employer had the right unilaterally to terminate the employment of all employees making up a bargaining unit by contracting out the work, there would, of course, be no point in bargaining for a renewal of the existing contract. The work performed by its former employees would be performed by employees of a subcontractor.

The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580-81 (1960). By guaranteeing employee participation in decisions relating to wages, hours, terms and conditions of employment, Congress made a determi-

nation that this would create an environment conducive to industrial harmony and eliminate costly industrial strife which interrupts commerce.

In framing Section 8(d) of the Act, 29 U.S.C. § 158(d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively. The statutory definition of those subjects about which the parties were required to bargain was of necessity framed in the broadest terms possible: wages, hours, terms and conditions of employment. The use of this language was a reflection of the congressional awareness that the act covered a wide variety of industrial and commercial activity and a recognition that collective bargaining must be kept flexible without precise delineation of what subjects were covered so that the Act could be administered to meet changing conditions. Congress left it to the Board, in the first instance, to give content to the statutory language, subject to review by the courts. *Richfield Oil Corp. v. National Labor Relations Board*, 97 U.S.App.D.C. 383, 231 F.2d 717, *cert. denied*, 351 U.S. 909 (1956).

The employer's contention in essence is that its unilateral action was justified because it was motivated solely by economic necessity and that the Board's rejection of the Union's Section 8(a)(3) claims shows the absence of any anti-union animus. But the Board's final conclusions do not rest on a basis of improper motivation. It is not necessary to find an anti-union animus as a predicate for a conclusion that the employer violated Section 8(a)(5) which commands good faith bargaining on wages, hours and terms and conditions of employment. It is enough that management's reasons for its proposal might have been deemed satisfactory by and have been acceptable to the Union. It is not necessary that it be likely or probable that the union will

yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly. By way of illustration: the union, after hearing management's side of the problem, might concede the justice of the claims and agree to invoke union discipline to increase productivity and reduce costs. Specifically it might proffer a six months trial period in which either productivity would be increased with the existing force of 73 men or maintained with a reduced force to effect the economics desired by management.<sup>2</sup> It has been so often pointed out that no citation is called for that the obligation to bargain is not an obligation to agree. The basic concepts underlying the Labor Management Relations Act call for utilization of joint efforts at the bargaining table as a substitute for labor strife.

Having in mind the broad powers conferred on the Board by Congress and our limited scope of review, we conclude on this record that the Board was warranted in its determination that the employer violated Section 8(a)(5) by refusing to bargain before terminating the employment of all the members of its maintenance force.

(3)

The General Counsel's case in support of the Section 8(a)(3) charge rested on proof of overt acts from which it sought to persuade the Board to draw inferences of anti-union animus. The evaluation of such evidence is a process peculiarly within the seasoned experience of the Board and we see no basis for disturbing its finding that no Section 8(a)(3) violation was proven.

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2. Paradoxically the employer concedes that it would have been interested in possible solutions which the union might have offered, but its course of action foreclosed negotiation at the threshold.

## (4)

Finally the Union challenges the Board's action in dating the back pay remedy only from the date of the Board's Supplemental Decision and Order. The Union relies on *A.P.W. Products, Inc.*, 137 NLRB No. 7, enforced, ..... F. 2d ..... (2d Cir. 1963). We think it sufficient to point out that in that case it was the Board which chose to modify its longstanding practice with regard to tolling of back pay between the Intermediate Report favorable to an employer and a subsequent reversal by the Board, and the Court of Appeals enforced the order. In the present case the Board has framed what it deems to be an appropriate remedy and we see no basis to depart from the general rule of allowing the Board wide latitude in shaping remedies. See *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *Phelps-Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941); *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U.S. 533 (1943).

*The Board's order  
will be enforced.*

(Title of Court and Cause Omitted)

On Petitions to Review and a Cross-Petition for Enforcement of an Order of the National Labor Relations Board

[Endorsed] United States Court of Appeals for the District of Columbia Circuit

Filed Jul 3 - 1963

Nathan J. Paulson, Clerk

Before: Danaher, Bastian and Burger, Circuit Judges.

### JUDGMENT

These cases came on to be heard on the record from the National Labor Relations Board, and on petitions to review and a cross-petition for enforcement of, the order of the National Labor Relations Board, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in these cases will be enforced.

Pursuant to Rule 38(b) the National Labor Relations Board shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

Per Curiam.

Dated: Jul 3 - 1963

(Title of Court and Cause Omitted)

[Endorsed] United States Court of Appeals for the District  
of Columbia Circuit

Filed Oct 10 1963

Nathan J. Paulson, Clerk

**DECREE**

Before: Danaher, Bastian and Burger, Circuit Judges.

This cause came on to be heard upon petitions of East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO and United Steelworkers of America, AFL-CIO, (No. 17275) and Fibreboard Paper Products Corporation, (No. 17468), to review and modify an order of the National Labor Relations Board dated September 13, 1962, directed against Fibreboard Paper Products Corporation, Emeryville, California, its officers, agents, successors and assigns, and upon the Board answers and petition to enforce said order. The Court heard argument of respective counsel on April 29, 1963 and has considered the briefs and the transcript of record filed in this cause. On July 3, 1963, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's said order. In conformity therewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by the United States Court of Appeals for the District of Columbia Circuit, that the said order of the National Labor Relations Board in said proceeding be, and it hereby is, enforced, and that Fibreboard Paper Products Corporation, its offi-



*Appendix*

cers, agents, successors and assigns, abide by and perform the directions of the Board in said order contained.

/s/ JOHN A. DANAHER

Judge, United States Court of Appeals  
for the District of Columbia Circuit

/s/ WARREN E. BURGER

Judge, United States Court of Appeals  
for the District of Columbia Circuit

/s/ WALTER A. BASTIAN

Judge, United States Court of Appeals  
for the District of Columbia Circuit

**Appendix B**

**STATUTES INVOLVED**

**National Labor Relations Act**

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible

to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

"Sec. 10.

"(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .

"(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

#### **Administrative Procedure Act**

"Sec. 5.

• • • • •

"(c) The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for

any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

. . . . .

"Sec. 6. Except as otherwise provided in this Act—

"(a) Appearance.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to

appear for or represent others before any agency or in any agency proceeding."

"Sec. 8.

"(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

"Sec. 10.

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold



unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

# **In the Supreme Court of the United States**

**OCTOBER TERM, 1963**

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**Nos. 610 AND 628**

**FIBREBOARD PAPER PRODUCTS CORPORATION, PETITIONER**

**v.**

**NATIONAL LABOR RELATIONS BOARD, EAST BAY UNION  
OF MACHINISTS, LOCAL 1304, UNITED STEELWORKERS  
OF AMERICA, AFL-CIO, AND UNITED STEELWORKERS  
OF AMERICA, AFL-CIO**

**AND**

**EAST BAY UNION OF MACHINISTS, LOCAL 1304, UNITED  
STEELWORKERS OF AMERICA, AFL-CIO, AND UNITED  
STEELWORKERS OF AMERICA, AFL-CIO, PETITIONERS**

**v.**

**NATIONAL LABOR RELATIONS BOARD AND FIBREBOARD  
PAPER PRODUCTS CORPORATION**

---

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT**

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## **MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD**

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**The Board found that the Company refused to  
bargain in violation of Section 8(a)(5) of the Na-  
tional Labor Relations Act by contracting out its  
maintenance work to an independent contractor with-**

**(1)**

out first bargaining about that decision with the Union,<sup>1</sup> which represented its maintenance employees (J.A. 20, 24-25). However, the Board, finding that the contracting out was motivated by economic considerations rather than by hostility to the Union, dismissed the complaint insofar as it alleged that the Company's action also violated Section 8(a)(3) and (1) of the Act (J.A. 36, 56-60). The Board ordered the Company, *inter alia*, to resume the maintenance operation previously performed by its employees, to offer those employees reinstatement to their former jobs and make them whole for any loss of pay suffered by them, and to bargain collectively with the Union (J.A. 27). The Company petitioned the court of appeals to review the Board's refusal-to-bargain finding, and the Union petitioned to review the dismissal of that part of the complaint alleging violations of Section 8(a)(3). The court of appeals upheld the Board in both respects, and enforced the Board's order in full (Co. Pet. App. 1-9). Both the Company and the Union have now filed petitions for certiorari with respect to the portions of the Board's decision which they contested in the court below.

The basic question presented by the Company's petition is whether an employer violates his bargaining obligation under the National Labor Relations Act when, because of economic considerations, he contracts out to an independent contractor certain work

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<sup>1</sup> Petitioners United Steelworkers of America, AFL-CIO, and its affiliate Local 1304, East Bay Union of Machinists.

previously performed by his employees without first bargaining about that decision with the union representing those employees. The holding of the court below that an employer is obligated to bargain about a proposed decision to contract out part of his operation is in direct conflict with *National Labor Relations Board v. Adams Dairy, Inc.*, 322 F. 2d 553 (C.A. 8). There the Eighth Circuit held that a dairy was not required to bargain about a decision to terminate its driver-salesmen and replace them with independent contractors, although it was obligated to bargain about the treatment of employees who were terminated by that decision. Moreover, the question is manifestly important in the administration of the Act. Accordingly, although we believe that the decision below is correct, we agree that it is appropriate that this Court resolve the conflict. We therefore do not oppose the grant of the Company's petition with respect to questions 1 and 3 (Co. Pet. 2).<sup>2</sup>

However, we submit that neither the remaining questions presented by the Company, nor the questions raised by the Union warrant review by this Court.

1. There is no merit to the Company's contention (Co. Pet. question 2, pp. 2, 18-20) that the court be-

<sup>2</sup> Question 1 presents the substantive question outlined above, and question 3 the related remedy problem—i.e., whether, assuming the refusal to bargain about contracting out violates the Act, the Board may properly order that the discontinued operation be resumed and that the former employees be reinstated with back pay.

low upheld the Board on a rationale different from that of the Board. The Board found that the Company violated the Act by contracting out its maintenance work without first negotiating or bargaining with the Union about that decision (J.A. 20, 24-25). The court adopted this finding (Co. Pet. App. 5, 8). Although the court pointed out that the Company did not bargain to an impasse before so doing (Co. Pet. App. 6), it was not thereby suggesting that the parties must bargain to a general impasse on all subjects before the employer would be free to contract out an operation. The court was merely indicating that bargaining about the subject of contracting requires not only that the employer notify the union of his intention to contract out, but that he withhold a final decision until he has discussed the subject with the union and exhausted every reasonable prospect of reaching an agreement on the issue. This much is implicit in the Board's position, too.

2. The Company further contends that the Board erred in denying its request to reopen the record for additional evidence, and in unduly delaying action on the motions for reconsideration (Co. Pet. question 4, pp. 2, 23-26). These contentions are likewise without merit. The evidence which the Company sought to adduce was for the purpose of showing that it now needed fewer maintenance employees than previously because certain manufacturing operations had been discontinued and others had been transferred to another plant. Assuming this to be so, it would not

render the reinstatement and back pay provisions of the Board's order inappropriate, but at most would diminish the number of jobs affected by the order. In these circumstances, it was within the Board's discretion to conclude that the details of compliance should be worked out in the supplemental Board compliance proceedings.

Nor is there any merit to the contention that the Board's order is invalid because the Board's delay in deciding the motions for reconsideration violated Section 6(a) of the Administrative Procedure Act, which provides that an agency shall "proceed with reasonable dispatch to conclude any matter presented to it." That provision is designed to avoid needless delays in administrative determinations, and it may afford a basis for compelling administrative action which is being withheld unreasonably. In the present case, however, the Board did act with "reasonable dispatch" in its handling of the motions for reconsideration. The Board originally had held, by a four-to-one vote, that the employer's refusal to bargain about the decision to turn over the maintenance work to an independent contractor did not violate Section 8(a)(5). Both the General Counsel and the Union sought reconsideration. Due to changes in the membership of the Board and the disqualification of one member to participate in the case,<sup>3</sup> the agency was

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<sup>3</sup> Member Brown, who had been appointed to the Board after the original decision, was disqualified because he had been the Regional Director who signed the complaint.



equally divided, even though a majority of the Board as then constituted was of the view that an employer has an obligation to bargain about making a decision to contract out an operation. In these circumstances the agency did not abuse its discretion in postponing its decision on the motions of reconsideration until, as a result of another decision, the majority view could be applied in the present case.<sup>4</sup> It was because of this delay that the Board provided for back pay only from the date of the supplemental decision on reconsideration, rather than from the date of the original violation.

3. The Union's petition is directed principally to the Board's dismissal of the Section 8(a)(3) allegation.<sup>5</sup> The Union draws a distinction between contracting out which is motivated by a desire to obtain more favorable terms and conditions of employment

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<sup>4</sup> In *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022, 1026-1028, decided following the change in the agency's membership referred to in the text, a majority of the Board ruled that an employer who refused to bargain about the making of a decision to contract out an operation violated Section 8(a)(5), and overruled the Board's original decision in the present case to the extent that it held to the contrary. Following the *Town and Country* decision and in reliance thereon, a three-member panel of the Board, to whom the present case had been assigned, issued the supplemental decision (from which one member dissented).

<sup>5</sup> The Union also contends (Union Pet. 2, question 2) that the Board abused its discretion in tolling the back pay period until after issuance of its supplemental decision and order. This question obviously is not of sufficient importance to afford an independent basis for certiorari. Indeed, the Union merely raises the question and does not discuss it further in the body of its petition.

and that which is motivated by other advantages. It contends that, where the motive is the former, the contracting out necessarily discriminates against the employer's employees because of their union membership (for this is the factor which has kept his labor cost higher than that of the outside contractor), and therefore the action violates Section 8(a)(3) even though the employer did not have an anti-union intent (Pet. 16-17). The Board, in dismissing the Section 8(a)(3) portion of the complaint, did not discuss the distinction which the Union seeks to draw; it merely held that, since the Company's motive was economic and not anti-union, the contracting out did not violate Section 8(a)(3). However, even assuming that the distinction which the Union makes is a valid one, the record in this case does not support its assumption that terms and conditions of employment were the sole, or even the chief, reason for the Company's decision to contract out its maintenance work. For example, the correspondence between Fluor, the independent contractor, and the Company suggests that at least one of the ways in which money was to be saved was by the use of "effective pre-planning and scheduling efforts along with carefully organized material controls" (J.A. 149). Any savings thus effected would be attributable to efficiencies in areas other than terms and conditions of employment. In sum, the issue which the Union seeks to raise is not presented on the record here.

For these reasons, we do not oppose the grant of the Company's petition with respect to questions 1 and 3. The Company's petition should be denied in all other respects, and the Union's petition should also be denied.

Respectfully submitted.

ARCHIBALD COX,  
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DECEMBER 1963.

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FILED

AUG 24 1964

JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 14

FIBREBOARD PAPER PRODUCTS CORPORATION,

*Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD, EAST  
BAY UNION OF MACHINISTS, LOCAL 1304,  
UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, and UNITED STEELWORKERS  
OF AMERICA, AFL-CIO,

*Respondents.*

## Petitioner's Brief

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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 14

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FIBREBOARD PAPER PRODUCTS CORPORATION,  
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, EAST  
BAY UNION OF MACHINISTS, LOCAL 1304,  
UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, and UNITED STEELWORKERS  
OF AMERICA, AFL-CIO,

*Respondents.*

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## Petitioner's Brief

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### OPINIONS BELOW

The opinion of the Court of Appeals is reported at 116 U.S. App. D.C. 198, 322 F.2d 411. The original Decision and Order of the National Labor Relations Board is reported at 130 NLRB 1558 and the Board's Supplemental Decision and Order is reported at 138 NLRB 550.

### JURISDICTION

The judgment of the Court below was entered on July 3, 1963 (R. 179). On July 26, 1963, within the time allowed



by order (R. 180), a petition for rehearing was filed (R. 180). On September 27, 1963, the petition for rehearing was denied (R. 181). On October 10, 1963, the decree of enforcement was filed (R. 182). Certiorari was allowed on January 6, 1964 (R. 183-184). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Court below and of the National Labor Relations Board rested on 29 U.S.C. § 160.

### **QUESTIONS PRESENTED**

Certiorari was granted upon the following questions:

1. Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?

2. Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?

The petition for certiorari also raised questions as to the sufficiency of the evidence and findings to support the Board's conclusion that Petitioner was guilty of a refusal to bargain, and as to the propriety of the Board's conduct in delaying action upon the motions for reconsideration of its original decision for a year and one-half because the four members of the Board who were qualified to participate in the case were equally divided, instead of promptly denying the motions because of the equal division in the Board. However, certiorari was granted only upon the two questions above stated.

**STATUTES INVOLVED**

Statutes involved in the case are Sections 8(a), 8(d), 9(a) and 10(c) of the National Labor Relations Act (29 U.S. Code §§ 158(a), 158(d), 159(a) and 160(c)), and section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)). Their text is set forth in the Appendix.

**STATEMENT OF THE CASE**

Petitioner has a manufacturing plant at Emeryville, California.

Until August of 1959, Petitioner did its own maintenance work about the plant. Some of its maintenance employees were represented for purposes of collective bargaining by a local of the United Steelworkers of America (hereinafter called the Union), with which Petitioner had a contract (R. 46).<sup>1</sup> The contract terminated on July 31, 1959 (R. 46) by reason of a sixty-day notice given by the Union (R. 47, 61). The notice had been supplemented by a proposal for a new contract involving substantial increases in all cost items (R. 61).

Petitioner had been concerned for some time about the high cost of its maintenance work (R. 57). Efforts to obtain the Union's cooperation in effecting lower costs had been unsuccessful (R. 53-54, 103-104), and Petitioner had studied the possibility of effecting savings by having the work done by a contractor specializing in plant maintenance (R. 57).

Following receipt of the Union's proposal above mentioned, the study was brought up to date (R. 57-58). If

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1: There were five bargaining units of maintenance workers, of which the Steelworkers represented only one. The other four were represented respectively by the Steamfitters Union, the Ironworkers Union, the Carpenters Union, and the Electricians Union (R. 102). In stating that the Steelworkers' contract "covered all Respondent's maintenance employees" (R. 46), the Trial Examiner was in error.

indicated that Petitioner might effect savings amounting to as much as \$225,000 per year by letting the work to an independent contractor (R. 58). In early August, after notifying the Union of its intention, outlining a plan of severance pay for employees to be terminated and discussing the matter at some length with the Union's business agents and, later, its negotiating committee (R. 49-54), Petitioner entered into a contract with Fluor Maintenance Company for performance of the maintenance work by Fluor (R. 58). Its sole purpose in doing so was to effect savings in its maintenance costs (R. 60).

Thereafter, Petitioner was charged by the Union with certain unfair labor practices, including a refusal to bargain, and proceedings were had before the National Labor Relations Board.

#### **The Board's Original Decision.**

In his Intermediate Report, the Trial Examiner set forth the facts stated above, including an account of the correspondence and discussions between Petitioner and the Union (R. 49-54), and found that "the allegations of the complaint, as amended, that [Petitioner] had engaged in certain acts and conduct violative of Section 8(a)(1), (3) and (5) of the Act are not supported by substantial evidence" (R. 61). He recommended dismissal (*ibid.*):

The Board, in a decision issued March 29, 1961, adopted "the findings, conclusions and recommendations of the Trial Examiner" (R. 35). The Board specifically agreed with the Trial Examiner that Petitioner's "motive in contracting out its maintenance work was economic rather than discriminatory," that its maintenance employees "were validly terminated," and that it had satisfied its obligation to bargain about termination pay (R. 36).

The Board then noted a contention by General Counsel "that the Trial Examiner did not pass upon an issue of primary importance in this case," namely, whether Petitioner "was under a statutory duty to bargain . . . about its decision to contract out the maintenance work" (R. 36), and the Board went on to discuss this question.

It was long-settled Board doctrine (see pp. 14-15, 30-33, *infra*) that although an employer must bargain about measures such as termination pay (wages) or the provision of other work (tenure of employment), designed to ease the impact upon employees of a legitimate business decision to contract out work or to close or move a plant, he need not bargain about the decision itself. In conformity with that doctrine, the Board, with one dissent, held that the statutory language is not "so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort" (R. 38).

It dismissed the complaint (R. 39).

#### **The Board's Supplemental Decision and Order.**

Shortly after the decision there were certain changes in the membership of the Board, and both the Union and General Counsel moved for reconsideration. The Board did not act upon the motions until September 14, 1962, nearly a year and a half later, when a three-member Panel, one member dissenting, rendered the Supplemental Decision and Order here under review.

A few months before its Supplemental Decision, the Board had prepared the ground for what was to come by announcing by way of dictum in *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022, decided April

13, 1962, that an employer's action in contracting out work without consulting the union representing affected employees would have constituted a refusal to bargain even if the employer had been motivated solely by economic considerations (136 NLRB at 1026). We refer to this as a dictum because the question was not presented; the employer had contracted out the work "to disparage and undermine the Union as majority bargaining agent" and was guilty of a refusal to bargain for this reason (*ibid.*).

The reason for the Board's long delay in acting upon the motions for reconsideration in the present case was that one of the Board's new members (Brown) was disqualified from participating in the case because he, as a regional director, had issued the complaint (R. 9), and the other four were equally divided.<sup>2</sup> Instead of denying the motions for reconsideration because of this equal division, the Board, in the words of the Solicitor General, postponed "its decision on the motions of reconsideration until, as a result of another decision [the *Town and Country* case], the majority view could be applied in the present case"<sup>3</sup>—in other words, until the view of the member who was disqualified from participating in the case could be given effect therein.

In the Supplemental Decision and Order, the Panel simultaneously granted the Union's motion for reconsideration (R. 19), and modified the original decision by holding that Petitioner had been under a duty to bargain about whether

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2. Members Rogers and Leedom had joined in the original decision and had dissented in *Town and Country Manufacturing Co.* Member Fanning had dissented from the original decision and had been joined by the new Chairman McCulloch and by new member Brown in the *Town and Country Manufacturing Co.* decision.

3. The quotation is from page 6 of the Solicitor General's response to the petition for certiorari.

to contract out its maintenance work (R. 20). It ordered Petitioner to resume performance of the maintenance operations, to reinstate the individuals formerly employed therein with back pay from the date of the order, and to then bargain about whether it should contract out the work (R. 27). After satisfying its obligation to bargain, it was to be free to again contract out the work (R. 25).

The Panel did not disturb the Board's original holding that Petitioner had not violated Section 8(a)(1) or 8(a)(3) of the Act and had satisfied its obligation to bargain about termination pay. The sole ground of the order was that Petitioner had been under a duty to bargain about whether to contract out the work, a conclusion to which the Panel said that it was driven by the decisions of this Court in *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960), *Teamsters Union v. Oliver*, 358 U.S. 283 (1959), and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (R. 21).

Regarding the nature and extent of the bargaining duty thus imposed, the Panel, quoting with approval its dictum in *Town and Country Manufacturing Company, Inc.*, *supra*, said (R. 20-21):

"Experience has shown . . . that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contemplates. But it commands no less."

Arguably, Petitioner had engaged in the prior discussion which "is all that the Act contemplates"; it had advised the Union of its intention to contract out the work (R. 49-50), had explained that its reason for doing so was to effect



savings in maintenance costs (R. 53-54), had repeatedly offered to discuss any questions that the Union might have (R. 50, 53, 108), and had offered to entertain a proposal, which the Union did not see fit to make, that contracting be deferred to permit of further discussion (R. 54, 86). However, if the Panel had these discussions in mind, it apparently did not regard them as conforming to its notion of bargaining.<sup>4</sup>

In justification of the "remedy" upon which it settled, the Panel had this to say (R. 25):

"As we stated in *Town and Country* 'It would be an exercise in futility to attempt to remedy this type of violation if an employer's decision to subcontract were to stand. No genuine bargaining over a decision to terminate a phase of operations can be conducted where that decision has already been made and implemented.' To adapt the remedy 'to the situation which calls for redress,' we shall order the Respondent to restore the *status quo ante* by reinstituting its maintenance operation and fulfilling its statutory obligation to bargain. Where that obligation has been satisfied after the resumption of bargaining, Respondent may, of course, lawfully subcontract is maintenance work."

"As we further stated in *Town and Country*, 'it would be equally futile to direct an employer to bargain with the exclusive bargaining representative of his employees over the termination of jobs which they no longer hold. Since the loss of employment stemmed

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4. The Panel made no mention of the discussions between Petitioner and the Union. It did not consider or find upon the question whether those discussions satisfied the bargaining requirement which its decision imposed, but assumed that the Board had found in its original decision that Petitioner had let the contract "without first negotiating with the duly designated bargaining agent over its decision to do so" (R. 19). That assumption was erroneous. In its original decision, the Board had confined itself to the question whether there was a duty to bargain about whether to let the contract and, holding that there was not, had never reached or considered the question whether such bargaining had in fact occurred.

directly from their employer's unlawful action in bypassing their bargaining agent, we believe that a meaningful bargaining order can be fashioned only by directing the employer to restore his employees to the positions which they held prior to this unlawful action.' Accordingly, we shall order that Respondent offer reinstatement to the employees engaged in the maintenance operation to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges. We shall also order that Respondent make them whole for any loss of earnings suffered as a result of Respondent's unlawful action in bypassing their bargaining agent and unilaterally subcontracting their jobs out of existence."

It added in a footnote (R. 25, n. 19) that the order imposed no "undue or unfair burden" on Petitioner, saying that "The record shows that the maintenance operation is still being performed in much the same manner as it was prior to the subcontracting arrangement." How the record could possibly show this in view of the fact that it had been three years since the evidence was closed, the Panel did not explain. And almost in the same breath with the statement above quoted, it denied Petitioner's request that the record be reopened for evidence that the operation was *not* still the same—that Petitioner had permanently discontinued certain of its manufacturing operations and had moved others to a new plant in another city, with substantial effect upon the nature and extent of the maintenance work at Emeryville (R. 19, n. 2).

#### **The Decision of the Court of Appeals.**

Petitioner petitioned for review of the decision, and the Board cross-petitioned for enforcement. The Court below granted the Board's request for enforcement. Rehearing was denied.

Upon the question whether Petitioner had been under a duty to bargain about its decision to contract out the work, the Court, referring to the 1947 revision of the Act, correctly stated (R. 176):

"In framing section 8(d) of the Act, 29 U.S.C. § 158(d), Congress was incorporating the decisions of the Board and the Courts defining the duty to bargain collectively."

But the Court continued on without observing that those decisions had denied the existence of a duty to bargain about a decision to contract out work (see pp. 14, 30-31, *infra*). Nor did the Court mention any of the subsequent decisions of the Board and the courts, of which there have been a number, dealing with the question (see p. 15, *infra*). The Court apparently was impressed by the fact that Petitioner's unilateral action "extinguished the entire collective bargaining unit" (R. 175).

Regarding the nature and extent of the bargaining duty, the Court was of the opinion that Petitioner, before taking unilateral action, should have bargained to an "impasse" (R. 174, 175).

Petitioner's objections to the requirement that it resume performance of the maintenance operations and reinstate with back pay the individuals who had been employed therein went unnoticed.

### **SUMMARY OF ARGUMENT**

(1) The Act does not by its terms require bargaining about whether an employer shall carry on particular business operations, but requires only that he bargain about the "wages, hours and other terms and conditions" upon which men are to be employed in the operations upon which he decides. While the Act may require bargaining about meas-

ures such as the provision of other work (tenure of employment) and termination pay (wages) tending to ease the impact upon employees of an employer's decision to rearrange his business, it does not require bargaining about the decision itself. This is the construction of the Act to which the Board adhered for twenty-seven years, and which Congress approved by leaving it undisturbed in two general revisions of the Act. The Board's newly conceived requirement of bargaining about every business decision having an impact upon employment or employees does violence to the language of the Act and means that the area in which bargaining is mandatory is without limits. It is impossible to conceive of a business decision (or of a union decision for that matter) which would be without impact upon employees or employment. Under the Board's new doctrine, no business decision can be made or effectuated except after the delays involved in negotiating with one or more unions, and except at the risk that what is done will some months or years later be ordered undone because of failure of the negotiations to conform in some respect to the Board's erratic notions of bargaining.

If the fact that the entire bargaining unit was extinguished has significance, its significance is the opposite of that given it by the Court below. Inasmuch as Petitioner did not want the services of any of those represented by the Union, the Union had nothing about which to bargain. An individual, while having the right to withhold his services and, therefore, to require bargaining about the terms upon which they will be made available to an employer who wants them, is possessed of no right to force them upon an employer who wants no part of them, or to require bargaining for their utilization. In holding that a union is entitled to require bargaining for the utilization of unwanted serv-

ices, the Board has held that a bargaining representative is entitled to exercise on behalf of those whom it represents a right which they do not possess.

(2) In requiring that Petitioner reinstate employees who were terminated for legitimate business reasons, the Board violated section 10(c) of the Act, which denies it power to reinstate employees terminated for cause. "Cause," as the legislative history shows, embraces any legitimate reason; the Board is empowered to reinstate only where the discharge was for what Senator Taft called "union activity."

Furthermore, the order is punitive rather than remedial. Petitioner was guilty only of a refusal to bargain. Since, as the Board has found, Petitioner is interested only in operating profitably and not in discriminating against the Union or its members, an order that it bargain about resuming performance of the work would serve fully the purposes of the Act. The award of back pay is not in aid of bargaining. And the requirement that bargaining be preceded by a resumption of operations and reinstatement is self-defeating, for there can be no assurance that bargaining would result in anything other than a return to contracting, and no terminated employee would consider leaving his current employment to return to Petitioner unless a bargain were first struck assuring him of something more than purely temporary employment at 1959 wage rates. Insofar as the order is based upon the theory that the letting of the contract was the "fruit" of Petitioner's refusal to bargain, it assumes without warrant in the record that bargaining would have resulted in abandonment by Petitioner of its plan to let the contract. Speculation that bargaining would have had one outcome rather than another is not a proper basis for a remedial order. In requiring that Petitioner turn back the clock three years (now five) and resume, without

prospect of reduced costs, performance of an operation which had been abandoned because it was too costly, the order serves no legitimate purpose and imposes upon Petitioner an unreasonable and unmerited hardship.

## ARGUMENT

### 1. The Act does not require bargaining about whether to let work to an independent contractor.

The language of the Act does not, in terms either specific or general, impose a duty to bargain about whether to let work to an independent contractor, and until the recent change in its membership the Board, with court and congressional approval, denied the existence of such a duty. We think it plain, for reasons upon which we are about to elaborate, that the Board's newly conceived doctrine is erroneous.

A. The Act does not by its terms require bargaining about the composition of an employer's business; it requires bargaining only about the wages, hours and other terms and conditions upon which men are to be employed therein.

The question whether Petitioner was under a duty to bargain about whether or not to contract out its maintenance work depends ultimately for its answer upon the meaning of the following provision of section 8(d) of the Act (29 U.S.C. § 158(d)):

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ."

Patently, the nature and extent of the business operations in which an employer shall engage is *not* one of the subjects



of mandatory bargaining specified in the foregoing provision. There is a manifest difference between a question as to whether an employer shall carry on particular business operations and a question as to the wages, hours or conditions at or upon which men are to be employed therein. The above provision, by its terms, requires bargaining only about the latter question, not about the former. As the Board said in its original decision in the present case (R. 38):

“ . . . although the statutory language is broad, we do not believe that it is so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort.”

The foregoing was not the Board's first decision to that effect. On the contrary, during the preceding twenty-odd years, it had repeatedly and consistently held that an employer was not required to bargain about a decision, motivated by legitimate business considerations, to contract out work or close or move his plant. *Brown McLaren Manufacturing Company*, 34 NLRB 984 (1941); *Mahoning Mining Company*, 61 NLRB 792, 803 (1945); *Walter Holm & Company*, 87 NLRB 1169, 1172 (1949); *Celanese Corporation of America*, 95 NLRB 664, 713 (1951); *Krantz Wire & Mfg. Co.*, 97 NLRB 971, 988 (1952); *National Gas Company*, 99 NLRB 273 (1952). He was required to bargain about measures such as termination pay (wages) or the provision of other work (tenure of employment) designed to ease the impact of the decision upon his employees (see, e.g., *Walter Holm & Company*, *supra*; *National Gas Company*, *supra*; *Brown Truck & Trailer Mfg. Co., Inc.*, 106 NLRB 999

(1953); *Bickford Shoes, Inc.*, 109 NLRB 1346 (1954); *California Footwear Co.*, 114 NLRB 765 (1955), enf. in part, 246 F.2d 886 (9th Cir. 1957); *Shamrock Dairy, Inc.*, 124 NLRB 494 (1959), enf. 280 F.2d 665 (D.C. Cir. 1960), cert. den. 364 U.S. 892, but he was not required to bargain about the decision itself.

Prior to the Board's reconsideration of the present case, three Courts of Appeals had given effect to the foregoing distinction and had squarely held that there was no duty to bargain over a decision to contract out work or close or move a plant (*Mount Hope Finishing Company v. NLRB*, 211 F.2d 365 (4th Cir. 1954); *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170 (2d Cir. 1961); *Jays Foods, Inc. v. NLRB*, 292 F.2d 317 (7th Cir. 1961)) and a fourth has since held to the same effect (*NLRB v. Adams Dairy, Inc.*, 322 F.2d 553 (8th Cir. 1963)). See also *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1963); *NLRB v. Abbott Publishing Co.*, 331 F.2d 209 (7th Cir. 1964). Cf. *Jewel Tea Co. v. Associated Food Dealers of Greater Chicago, Inc.*, 331 F.2d 547 (7th Cir. 1964).

Also reflecting that long-accepted view of the law were cases such as *NLRB v. Houston Chronicle Pub. Co.*, 211 F.2d 848 (5th Cir. 1954); *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1954); *NLRB v. Adkins Transfer Co., Inc.*, 226 F.2d 324 (6th Cir. 1955); *NLRB v. Drennon Food Products Co.*, 272 F.2d 23 (5th Cir. 1959); *NLRB v. R. C. Mahon Co.*, 269 F.2d 44 (6th Cir. 1959); *NLRB v. Lassing*, 284 F.2d 781 (6th Cir. 1960), cert. den. 366 U.S. 909; and *NLRB v. Kingsford*, 313 F.2d 826 (6th Cir. 1963), in which the legality of unilateral action in contracting out work or closing a plant was treated by both the Board and the courts as depending entirely upon the employer's motive;

neither the Board nor anyone else thought of contending that bargaining was required.<sup>5</sup>

5. Illustrative of the general understanding of what was, and what was not, embraced by the statutory phrase, "wages, hours and other terms and conditions of employment," were remarks made in 1956 to the American Academy of Arbitrators by Mr. Justice Goldberg, then general counsel of the United Steelworkers of America. See Arthur J. Goldberg, "Management's Reserved Rights: A Labor View," 7 Proceedings of the National Academy of Arbitrators 118, B.N.A. 1956. He said:

"When a contract says that management has the exclusive right to manage the business, it obviously refers to *the countless questions which arise and are not covered by wages, hours, and working conditions, such as determination of products, equipment, materials, prices, etc.*"

"Management determines the product, the machine to be used, the manufacturing method, the price, the plant layout, the plant organization, and innumerable other questions. These are reserved rights, inherent rights, exclusive rights which are not diminished or modified by collective bargaining as it exists in industries such as steel. It is of great importance that this be generally understood and accepted by all parties. Mature, cooperative bargaining relationships require reliance on acceptance of the rights of each party by the other. A company has the right to know it can develop a product and get it turned out; develop a machine and have it manned and operated; devise a way to improve a product and have that improvement made effective; establish prices, build plants, create supervisory forces and not thereby become embroiled in a labor dispute.

"Our ability to have this accepted without question depends on equally clear acceptance by management of the view that the exercise of these rights cannot diminish the rights of the worker and the union. For instance, a new method of manufacture may raise several issues of working arrangements, crews, spell periods, schedules, rates, etc. These are usually susceptible to determination by application of contract clauses, practices, precedents, etc. An effort to claim that the exclusive right of management to establish a new method of manufacture keeps the worker from objecting effectively to the resulting working conditions not only confuses the labor-management issues, but it makes more difficult unequivocal acceptance of the rights of management. We are entirely in agreement that the company can establish the manufacturing methods, but if management attempts to use this right as the basis for diminishing labor's rights, then there must inevitably develop hostility to the whole concept of exclusive management rights." (emphasis supplied)

It was not until a year after its original decision in the present case that the Board, in *Town and Country Manufacturing Company, Inc., supra*, conceived the view to which it now adheres that there is a duty to bargain about any management decision having an impact upon bargaining unit jobs. Shortly after its *Town and Country Manufacturing Company* dictum, the Board, in reliance thereon, held in *Reñton News Record*, 136 NLRB 1294 (1962), that a publisher must bargain about whether to set type by a different process than that theretofore employed. It explained:

"... the impact of automation on a special category of employees is a matter of grave concern to them. It may involve not only their present but their future employment in the skills for which they have been trained." 136 NLRB at 1297.

Since then, the Board, for like reasons, has held that an employer must bargain about whether to discontinue his business because of financial difficulties (*Lori-Ann of Miami*, 137 NLRB 1099 (1962)), about whether to sell his product through independent distributors rather than through a sales force of his own (*Adams Dairy, Inc.*, 137 NLRB 815 (1962), enf. den. 322 F.2d 553 (8th Cir. 1963)), about whether to ship by common or contract carrier rather than by his own trucks (*American Manufacturing Company of Texas*, 139 NLRB 815 (1962); *Brown Transport Corporation*, 140 NLRB 954 (1963)), about whether to sell all or a part of his business (*Weingarten Food Center of Tenn., Inc.*, 140 NLRB 256 (1962); *Star Baby Co.*, 140 NLRB 678 (1963)), about whether to transfer particular work from one plant to another (*West Side Lumber Co.*, 144 NLRB No. 14 (1963)), and about whether to purchase for distribution a product already packaged rather than pack-

age the product himself (*Winn-Dixie Stores, Inc.*, 147 NLRB No. 89 (1964)).<sup>6</sup>

The Board's new concept of the scope of mandatory bargaining is, we submit, without basis in the language of the Act. The Act does not require bargaining about all matters having "impact" upon employment or employees. It requires bargaining only about "wages, hours and other terms and conditions of employment." As this Court said in *NLRB v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958):

"The duty is limited to those subjects . . . As to other matters, . . . each party is free to bargain or not to bargain." (356 U.S. at 349)

In the foregoing case, this Court had before it a problem analogous to that before it now. As pointed out in the dissent therein, the timing of a strike vote and the manner in which it is taken "affects the employer-employee relationship in much the same way" as a "no strike" clause (356 U.S. at 353). Nevertheless, the Court held that an employer's proposed clause governing strike votes was not one upon which bargaining was required because "It settles no term or condition of employment" (356 U.S. at 350).<sup>7</sup>

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6. Contrast these holdings with the remarks quoted in note 5, p. 16, *supra*. In cases upon which the Board itself has not yet passed, trial examiners have held that an employer must bargain about whether to serve a particular market area from one distributing plant rather than another (*Shell Oil Company*, NLRB Case No. 7-CA-4359) and about whether to terminate a contract with a customer (*William J. Burns International Detective Agency, Inc.*, NLRB Cases Nos. 17-CA-2145 and 2161).

7. A like question would be presented by an employer proposal limiting the amount of the dues that a union may charge. A provision for a checkoff of union dues, establishing, as it does, a term of employment dealing with wages, is clearly a subject upon which bargaining is required. Just as clearly, an employer may properly insist upon a limit upon the amount which he will be required to check off. However, it would be something else again for him to propose a limit upon the amount that the union may charge; the

An employer's decision to let the performance of given operations to an independent contractor undoubtedly has an impact upon employment, present or potential, both in his own operations and in those of the contractor. However, his decision fixes no term or condition of employment. It is not even, of itself, a decision to terminate individuals presently employed. The work may always have been contracted out, or it may be work in excess of the capacity of the existing work force. And even where, as in the present case, the effect is to deprive an employee of the particular work which he has been doing, his tenure of employment is affected by its removal only if the employer fails to provide him with other work. It is for this reason that the Board, in the past, has required bargaining only about the provision of other work (or, in the alternative, termination pay). There are reasons for doubting that the Board was correct in going even this far,<sup>8</sup> but this is a question not here presented and with which, therefore, we need not concern ourselves; Fibreboard has been convicted of a refusal to bargain, not about the provision of other work or termination pay, but about its decision to let the contract.

8. The Board's new concept of the field in which bargaining is mandatory would obliterate all boundaries; there would be no subject about which bargaining, if permissive, would not be mandatory.

If the Board's new concept is correct, then, contrary to this Court's decision in the *Borg-Warner* case, the subjects of mandatory bargaining are without limit. We say this because it is impossible to conceive of a business decision

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latter proposal, notwithstanding its impact upon the amount he would be required to deduct from wages, would fix no term or condition of employment and clearly would not be one upon which bargaining is required.

8. See dissent in *Town and Country Manufacturing Co., supra*, 136 NLRB at 1034.



which would be without impact upon employment or employees. A manufacturer's purchase from others of component parts for his product has precisely the same impact upon employment as does the letting of work to an independent contractor or its transfer to another plant. So does discontinuance of an unprofitable line. A corporate merger has precisely the same impact upon employees of the corporation losing its identity as a sale of its business and assets.<sup>9</sup> So does a petition in voluntary bankruptcy. Rejection of a customer order has precisely the same impact upon employment as would acceptance of the order and its assignment to an independent contractor or to another plant. Rejection of a job by a contractor has precisely the same impact upon his employees and their employment as the letting of a job has upon employees of the employer who lets it. The unquestionable impact of their subject matter upon wages, hours and conditions of employment has been the basis in times past of union demands governing or restricting the sale by an employer of his products (see, e.g., *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949); *Commonwealth v. McHugh*, 326 Mass. 249, 93 N.E. 2d 751 (1950)) or the kinds of merchandise in which he may deal (see, e.g., *Alpha Beta Food Markets v. Amalgamated Meat Cutters*, 147 Cal. App. 2d 343, 305 P.2d 163 (1956)) or the hours during which he may do business (see, e.g., *Jewel Tea Co. v. Associated Food Retailers of Greater Chicago, Inc.*, 331 F.2d 547 (7th Cir. 1964); *Kold Kist, Inc. v. Amalgamated Meat Cutters*, 99 Cal. App. 2d

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9. See *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). In holding an employer guilty of a refusal to bargain about a sale of assets, a trial examiner has said that "sales, or mergers, or other dispositions of facilities in our rapidly changing economy have such an obvious, direct and devastating impact on the jobs of employees that they fall within the principle relied upon by the Board in subcontracting cases." *United Dairy Co.*, 1963 Daily Lab. Rep. No. 107, at D-1, Case No. 6-CA-2551; emphasis supplied.

191, 221 P.2d 724 (1950)) and demands aimed at price and market control (see. e.g., *Allen Bradley Co. v. Local Union*, 325 U.S. 797 (1945)).

An employer must bargain about the wages, hours and terms and conditions of employment, not only of individuals currently on his payroll, but also of individuals as yet unidentified whom he might employ or consider for employment in the future. Hence, if there is a duty to bargain about matters having an "impact" upon employment, that duty extends to matters having an impact upon "future employment" as well as present. *Renton News Record*, *supra*, 136 NLRB at 1297. It therefore is immaterial that because of an expanding workload, the letting of work to an independent contractor or its assignment to another plant will be without impact upon the employment of individuals currently on the payroll; the employer nevertheless must bargain.<sup>10</sup>

Nor is that duty limited to cases in which it is the employer who desires a change. If there is a duty to bargain about whether to contract out work, transfer it to another plant, close or move a plant, discontinue a product, purchase components from others, or sell the business, then the employer must bargain upon a union demand that he do so. And conversely, he must bargain upon a union demand that he discontinue an existing practice of letting some of his work to independent contractors, or of having it done in another plant, or of purchasing particular com-

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10. In *Shell Oil Company*, *supra*, note 6, the trial examiner held that the employer was under a duty to bargain about a decision to serve its customers in Lansing, Michigan, from its distributing plant at Grand Haven rather than from its plant at Detroit as in the past. The trial examiner so held notwithstanding the fact that because of an increasing volume of work at Detroit, the transfer of Lansing deliveries to the Grand Haven plant did not result in termination of any Detroit employees.

ponents from others, or of utilizing labor saving machinery or processes.

An employer can derive little comfort from the Board's glib assertion that "prior discussion with a duly designated bargaining representative is all that the Act contemplates." In the court below it developed that "prior discussion" means bargaining to "impasse" (R. 174, 175). An employer will be fortunate if he has only one union with which he must deal; Petitioner had five,<sup>11</sup> and if its decision had been one affecting production as well as maintenance workers, it would have had thirteen.<sup>12</sup> A reasonably skilled union negotiator knows how to fence when it suits him to do so, and union negotiations may be, and often are, protracted. The Board's decision means that the pace at which an employer does business will be limited to the pace set in bargaining by the union or unions with which he must deal. It means that if a union is dissatisfied with the outcome, it will be free to strike or picket and will have the protection of the Act in so doing. Even more serious is the fact, demonstrated by the present case, that no matter what discussions may have been had, the employer can make and effectuate his decision only at the risk that some years later<sup>13</sup> what he has done will be ordered

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11. The Steelworkers, the Steamfitters Union, the Ironworkers Union, the Carpenters Union, and the Electricians Union. See note 1, p. 3, *supra*.

12. Petitioner had eight bargaining units of production workers, represented, respectively, by the Oilworkers Union, the Printing Specialties Union, the Pulp and Sulfide Workers Union, the International Longshoremen's and Warehousemen's Union, the Paint-makers Union, the Sheet Metal Workers Union, the Teamsters Union, and the Associated Chemists (R. 102).

13. Cases decided by the Board in 1958 involved an average elapsed time of nearly one and one-third years (465 days) between issuance of the complaint and rendition of the Board's decision and almost two and one-half years between issuance of the complaint and

undone because the Board's interpretation of those discussions fails to satisfy in some respect its notions of bargaining. The dissent from the supplemental decision put the matter accurately (R. 32):

"The time involved in extensive negotiations and in protracted litigation before the Board, together with the numerous technical vagaries, practical uncertainties, and changing concepts which abound in the area of so-called 'good faith bargaining,' make it impossible for management to know when, if, or ever, any action on its part would be clearly permissible. These factors, together with the crushing, burdensome remedy, which this Agency will retroactively impose upon a given enterprise, should the National Labor Relations Board determine that the action of management was (for whatever reason) improperly taken, will serve effectively to retard and stifle sound and necessary management decisions. Such a result, in my opinion, is compatible neither with the law, nor with sound business practice, nor with a so-called free and competitive economy."

- C. This Court has never held that an employer must bargain about the composition of his business, but has recognized that he has the right, acting independently of unions representing his employees, to rearrange his business as he sees fit.

The Panel majority regarded the question whether Fibreboard was under a duty to bargain about whether to let the contract as being "foreclosed" by the decisions of this Court in *Order of Railroad Telegraphers v. Chicago & N.W.R. Co.*, 362 U.S. 330 (1960); *Teamsters Union v.*

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a court decree enforcing or setting aside the Board order. *Report of Advisory Panel on Labor-Management Relations Law to the Senate Committee on Labor and Public Welfare*, Sen. Doc. No. 81, 86th Cong. 2nd Sess., p. 10 (1960). In the present case, the elapsed time between issuance of the complaint and rendition of the Supplemental Decision was approximately three years. It has now been nearly five years since the complaint was issued.

*Oliver*, 358 U.S. 283 (1959), 362 U.S. 605 (1960); and *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). However, none of these cases is controlling.

In the *Telegraphers* case, the Court held that the Norris-LaGuardia Act precluded issuance of an injunction against a strike to force amendment of a bargaining contract to prohibit the discontinuance of existing positions. The decision was based upon the ground that the case presented a "labor dispute" within the meaning of the Norris-LaGuardia Act, which is to be broadly construed, and that the Union's demand was not rendered unlawful by the Railway Labor Act or any other federal statute.

To hold that the Norris-LaGuardia Act deprives a federal court of jurisdiction to enjoin a strike is not to hold that the demand in support of which the strike was called is one over which the employer must bargain. *Lauf v. Shinner*, 303 U.S. 323 (1938). As said in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 205 (1962), the Norris-LaGuardia Act is not limited to the protection of collective bargaining.

Nor does the fact that a demand is lawful mean that it is one over which bargaining is required. *NLRB v. Wooster Division of Borg-Warner Corporation*, *supra*.

The only thing in the Court's opinion that could possibly be taken to mean that the Railway Labor Act required bargaining over the union's demand was a brief statement by way of dictum that "the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effect to settle all disputes 'concerning rates of pay, rules and working conditions.'" 362 U.S. at 339. We refer to the foregoing as a dictum because applicability

of the Norris-LaGuardia Act does not depend upon the existence of a duty to bargain about the subject in controversy (see *Sinclair Refining Co. v. Atkinson*, *supra*), and the question whether there was such a duty was not presented. Another decision of this Court contains a dictum contrary to that above quoted.<sup>14</sup>

If the *Telegraphers* case were nevertheless to be regarded as holding that the Railway Labor Act imposes a duty to bargain over a legitimate business decision to close or move a plant or contract out a part of the operations, the fact would remain that it most certainly did not hold that any such duty is imposed by the National Labor Relations Act. The latter Act is "a quite different law." *Sinclair Refining Co. v. Atkinson*, *supra*, at 211.

*Teamsters Union v. Oliver*, which was before the Court on two occasions; involved questions as to the validity under the Ohio antitrust laws of certain provisions of a bargaining contract between the Teamsters Union and a motor carrier. The provision first considered was one which fixed the minimum truck rental to be paid a driver-owner while driving his truck in the carrier's service; operation of the provision was "narrowly restricted . . . to the times when the owner drives his leased vehicle for the carrier." (358 U.S. at 293.) The effect of the provision, in conjunction with that governing wage rates, was to fix

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14. In *Virginian Railway Co. v. System Federation*, 300 U.S. 515 (1937), the Court, in commenting upon the effect which a strike in the railroad's "back shops" would have upon commerce, said:

"It is no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors. Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management. It is petitioner's determination to make its own repairs which has brought its relations with shop employees within the purview of the Railway Labor Act." 300 U.S. at 557 (emphasis supplied).



the minimum compensation payable for the services of the driver and the use of his truck and thus prevent circumvention of the wage provision by payment of an inadequate truck rental. Since the provision dealt with wages, it was held to be within the scope of mandatory bargaining and, therefore, immune from the state antitrust law.

The provisions before the Court on the second occasion restricted the carrier's right to use hired trucks. In a one-paragraph *per curiam* opinion granting certiorari and disposing of the merits, the Court said that "these provisions are at least as intimately bound up with the subject of wages as the minimum rental provisions" (362 U.S. at 606). If the Court meant by this that the question whether an employer may rent or lease equipment from others is intimately bound up with the question of what wages are to be paid his employees, we suggest that this is untrue. Furthermore, the question whether the contractual provisions under attack dealt with subjects about which bargaining was mandatory was not presented. It was sufficient to deprive the State of power that the conduct in question was "arguably" protected by section 7 of the Act or condemned by section 8; the question whether it was actually so protected or condemned was for the Board to decide in the first instance and, hence, was "outside the scope of this Court's authority." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). Accord: *Garner v. Teamster's Union*, 346 U.S. 485 (1953); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

In *United Steelworkers v. Warrior and Gulf Navigation Co.*, the Court held only that a contractual provision for arbitration of any difference as to the "meaning and application of the provisions of the agreement" required arbitration of the union's contention that the contract

deprived the employer of its right to let work to an independent contractor no matter how lacking in merit that contention might be. The decision was without bearing upon the question presented by the instant case. However, in the course of its opinion, the Court remarked that "Contracting out work is the basis of many grievances," and the Board, in the present case, seized upon that remark to conclude (R. 24):

"As the Supreme Court has noted, subcontracting or contracting out is a subject extensively dealt with in today's collective bargaining. The present decision does not innovate; it merely recognizes the facts of life created by the customs and practices of employers and unions."

We question the accuracy of the Board's statement that "contracting out is a subject extensively dealt with in today's collective bargaining." Union contracts restricting the right to contract out work are, in fact, uncommon.<sup>15</sup> It undoubtedly is true that an employer occasionally will yield to a union demand for inclusion in their contract of a provision regarding which bargaining is not required by law. However, as the Board itself has held, the question whether a union proposal is one upon which bargaining is required does not depend for its answer upon whether the union has been successful in obtaining its inclusion in

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15. A study by the Department of Labor of 1,687 collective bargaining agreements in effect in 1959 reveals that "fewer than one out of four major agreements in effect in 1959 made any reference to subcontracting" and that "only 4 . . . prohibited the practice outright." Bulletin No. 1304, United States Department of Labor, August, 1961. Indicative of what was the practice of most employers is the fact that following the Board's *Town and Country* decision, there was a flood of cases complaining of unilateral action by employers in contracting out work. There were 26 such cases pending before the Board at the time we wrote our petition for certiorari (see Pet. for Cert. p. 13).

contracts with other employers (*Locals 164, 1287 and 1010, Brotherhood of Painters, Decorators and Paperhangers of America*, 126 NLRB 997, 1002, n.4 (1960), enf. 293 F.2d 133 (D.C. Cir. 1961), cert. den. 368 U.S. 824 (1961)). As in *Sinclair Refining Co. v. Atkinson*, *supra*, the question here presented is dependent for its answer, not upon "the prevailing circumstances of contemporary labor-management relations," but upon "a correct judicial interpretation of the language of the Act as it was written by Congress" (370 U.S. at 202).

There has not heretofore been presented to this Court either the general question whether the Act requires bargaining about the nature and extent of the business operations in which an employer is to engage, or the specific question, embraced by the general, whether the Act requires bargaining about whether he shall let work to an independent contractor. However, in *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), in which the Court held that the corporation surviving a corporate merger was bound by the arbitration provision of the union contract of the other party to the merger, the Court explained. (at page 904):

"Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that *the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers* be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and

industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces.' " (emphasis supplied)

As demonstrated by this Court's decision in the *Borg-Warner* case, *supra*, there exists somewhere a line dividing subjects about which bargaining, although permissible, is not required, from subjects about which bargaining is mandatory. The line which the Board, until its dictum in *Town and Country Mfg. Co.*, drew between questions as to the nature, extent or location of the operations in which an employer is to engage, and questions as to the wages, hours and terms or conditions upon which men are to be employed in those operations, gave effect to the language of the Act as written by Congress. Employees were not left without needed "protection . . . from a sudden change in the employment relationship"; the requirement that their representative be given advance notice of the change and an opportunity to bargain over protective measures such as the provision of other work or termination pay met that need while preserving "the rightful prerogative of owners independently to rearrange their businesses." *Wiley & Sons v. Livingston*, *supra*.

In contrast, the Board's new concept of the bargaining duty would obliterate the line between questions as to the composition of the employer's business and questions as to the terms and conditions upon which men are to be employed therein, and would distort beyond recognition the language of the Act. Indeed, if given the full effect for which its rationale calls, the Board's new concept would deny the existence of any limit whatever to the area in which bargaining is required.

- D. The contemporaneous administrative interpretation of the Act as not requiring an employer to bargain about the composition of his business withstood the test of twenty-seven years and two general revisions of the Act.

Until its dictum in *Town and Country Manufacturing Company, Inc., supra*, decided twenty-seven years after enactment of the Wagner Act, it was settled Board doctrine, as we have hereinbefore indicated, that an employer is not required to bargain about a decision, motivated by legitimate business considerations, to contract out work or close or move his plant.

In *Brown-McLaren Manufacturing Company*, 34 NLRB 984 (1941), the employer, in the past, had sought unsuccessfully to obtain the union's agreement to a reduction in wage costs. It had then, from time to time, contracted various of its manufacturing operations to a plant, which it ultimately acquired, in another locality where wage costs were lower, and from time to time it had moved machinery and equipment to the new plant until the old plant was completely closed. Upon learning that work had been contracted out, the union asked the employer to bargain over the matter, offering in this connection to negotiate a wage decrease, but the employer replied "that the matter was no longer open to negotiation." 34 NLRB at 1000-1001. Upon learning of the contemplated removal of machines and equipment, the union asked the employer "to negotiate with respect to the proposed removal," but the employer "flatly refused to negotiate concerning their removal." 34 NLRB at 1002. Later, the union again "sought to negotiate regarding the removal of further machinery and equipment," but the employer "refused to discuss the matter." 34 NLRB at 1004. The Board found that the removal "resulted from a desire to diminish or avoid loss by having the work performed at a lower labor cost" and held that the employer's "refusal on and after November 8, 1937,

to negotiate concerning the transfer or removal of operations from the Detroit to the Hamburg plant did not constitute a refusal to bargain collectively." 34 NLRB at 1007.

The employer also had refused on several occasions to discuss with the union the matter of transferring employees to the new plant. These refusals, the Board held, stood "on another footing" and "constituted refusals to bargain collectively, within the meaning of Section 8(5)." 34 NLRB at 1007.

In *Mahoning Mining Company*, 61 NLRB 792 (1945), where an employer who had a union agreement covering three mines let the operation of two of the mines to an independent contractor without advising the union and, upon renewal of the union agreement, refused to negotiate regarding employees at these two mines, the Board reversed the trial examiner's finding that the employer had refused to bargain and held:

"Since changing conditions in industry necessitate revision of bargaining units which will best effectuate the policies of the Act, the Board has never held that once it has established an appropriate unit for bargaining purposes, an employer may not in good faith without regard to union organization of employees, change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change." 61 NLRB at 803.

In *Walter Holm & Company*, 87 NLRB 1169 (1949), where the employer, following certification of the union as the bargaining representative of its truck drivers, leased the trucks to its drivers as independent contractors without prior notice to the union and then refused to negotiate an



agreement with the union on the ground that the drivers were no longer its employees, the Board, in reversing a contrary conclusion by the trial examiner, held:

"Section 8(a)(5) does not require an employer to consult with its employees' representative as a prerequisite to going out of business for nondiscriminatory reasons." 87 NLRB at 1172.

The Board went on to hold that the alleged independent contractors were in fact employees and that for that reason, but for that reason only, the employer had been guilty of a refusal to bargain.

In *Celanese Corporation of America*, 95 NLRB 664 (1951), the employer had contracted out its maintenance work without consulting the union. The Board, in holding that the employer had not thereby refused to bargain, adopted the findings and conclusions of the intermediate report wherein the trial examiner, after referring to the cases of *Mahoning Mining Company* and *Walter Holm & Company*, both *supra*, concluded:

"... the Company was not required to consult with the Union as the representative of its employee before entering into this contract any more than if it was going out of business for nondiscriminatory reasons." 95 NLRB at 713.

In *Krantz Wire & Mfg. Co.*, 97 NLRB 971 (1952), where the employer leased the physical facilities of his business to another employer and terminated his employees without prior notice to the union, the Board adopted the trial examiner's report absolving the employer, in these words, of a charge of refusal to bargain:

"An employer is free to close his plant and discharge his employees for any reason or for no reason at all, provided only that he does not do so with the purpose of discouraging or encouraging union membership, or

otherwise interfering with the exercise by his employees of the rights guaranteed in Section 7 of the Act. Where he closes his plant for legitimate business reasons the Act does not require that he consult with his employees' representatives as a prerequisite to going out of business." 97 NLRB at 988.

In *National Gas Company*, 99 NLRB 273 (1952), where the employer, "while maintaining that the decision to contract out the installation work was not a bargainable matter, readily recognized the interest of the Union in the problem of the displaced men" (99 NLRB at 277), neither General Counsel nor the Union challenged the trial examiner's holding that the employer was under no duty to bargain about its decision to contract (*ibid.*), and the Board held the employer guiltless of a refusal to bargain because

"... the precise issue over which the parties reached an impasse at the May 2 meeting did not concern the question of the re-employment of the installation men, but related to the question of whether the Respondent's decision to contract out all its installation work should stand or be withdrawn." 99 NLRB at 278.

And finally, of course, there was the Board's original decision in the instant case, in which it concluded (R. 38):

"... although the statutory language is broad, we do not believe it so broad and all inclusive as to warrant an inference that the Congress intended to compel bargaining concerning basic management decisions, such as whether and to what extent to risk capital and managerial effort."

In its *Town and Country Mfg. Co.* decision, *supra*, the Board majority referred to *Timken Roller Bearing Co.*, 70 NLRB 500 (1946) as having held the contrary. There it

had been the employer's practice since prior to advent of the union to contract out certain of its work. The employer rejected the union's request for a meeting to discuss this practice, thereby refusing to discuss any aspect of the matter. The Board's order holding the employer guilty of refusing to bargain about this and other matters was vacated by the Court of Appeals because the union, if it had any just cause for complaint, should have followed the grievance procedure for which its bargaining contract provided. *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949 (6th Cir. 1947). The Board devoted little attention to the contracting question (it was but one of the many involved in the case) and it apparently did not intend to hold anything more than that there was a duty to bargain about the effect of contracting upon tenure of employment and hours of work.<sup>16</sup> The case was both preceded and followed by decisions clearly and explicitly holding that an employer is under no duty to bargain about a decision to contract out work (as contrasted with measures designed to ease the impact upon employees), and it was not until *Town and Country Mfg. Co.*, decided some sixteen years later, that the Board conceived of *Timken Roller Bearing Co.* as having held the contrary.

A long-standing administrative interpretation of a statute (and twenty-seven years should satisfy the requirement

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16. The Board spoke of the employer as having refused to bargain "regarding the subcontracting of work" and ordered that it desist from refusing to bargain "with respect to . . . the subcontracting of work." (70 NLRB at 504-505; emphasis supplied.) In *California Footwear Company*, 114 NLRB 765, 766 (1955), the Board used similar language (saying that the employer was under a duty to bargain "with respect to" a plant removal), where it was plain from the context that it was talking only about bargaining about the transfer of employees. The Board's language is not always precise.

of longevity) should not be overturned except for very cogent reasons; this is particularly true where, as here, the interpretation originated early in the administration of the statute with men who presumably were familiar with the congressional purpose and at a time when recollection of that purpose was still fresh.<sup>17</sup> *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956). The statute, we submit, does not change meaning with a change in the membership of the Board.

But here we have more than an administrative interpretation standing alone; we have congressional approval. The Act, from the beginning, has contained in section 9(a) the following provision (29 U.S.C. § 159(a)):

“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.”

In 1947, and again in 1959, Congress considered in great detail the provisions of the earlier legislation as it had been applied by the Board (see H.R. Rep. No. 245, 80th Cong., 1st Sess.; S. Rep. No. 105, 80th Cong., 1st Sess.; S. Rep. No. 187, 86th Cong., 1st Sess.; H.R. Rep. No. 741, 86th

17. Of the three members of the board which decided *Brown-McLaren Manufacturing Company*, *supra*, p. 30, in 1941, one (Edwin Smith) had served from the beginning, and another (William Leiserson) had served since 1939. Of the five members of the boards which decided *Walter Holm & Company*, *supra*, p. 31, in 1949, and *Celanese Corporation of America*, *supra*, p. 32, in 1951, three (Paul M. Herzog, John M. Houston and James J. Reynolds, Jr.) had served while the 1947 revision of the Act was being considered by Congress. Two of those three (Herzog and Houston) were still members of the Board in 1952 when it decided *Kranz Wire & Mfg. Co.*, *supra*, p. 32, and *National Gas Company*, *supra*, p. 33.

Cong., 1st Sess.). Although the Board had rendered two of the decisions to which we have referred prior to 1947 and had rendered the others prior to 1959, Congress did not on either occasion see fit to change the rule enunciated and applied in those decisions. It is a fair implication that in 1947, by incorporating in section 8(d) substantially the same language as had been used in section 9(a), and, in 1959, by re-enacting both sections without pertinent modification, Congress accepted and approved the administrative construction which had been placed thereon. *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956); *Farmers Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

- E. The decisions of the Board and of the court below are based upon a mistaken premise as to the nature of collective bargaining and the status of the bargaining representative.

The court below apparently attributed significance to the fact that Petitioner, in contracting out the work, "extinguished the entire collective bargaining unit" (R. 175). But in *Walter Holm & Company, supra*, p. 31, and in *Krantz Wire & Mfg. Co., supra*, p. 32, the fact that the entire bargaining unit was extinguished by the employer's unilateral action did not deter the Board from holding that the employer had been under no duty to bargain about it.

If the fact that the entire bargaining unit was extinguished has significance, its significance is exactly the opposite of that which the court below gave it. A bargaining representative exercises only the collective rights of those whom it represents. The individual has the power to withhold services desired by an employer and the concomitant right to bargain about the terms upon which his services will be made available. His right to bargain about those terms obviously is dependent for its existence upon his

power to withhold, and it is that power, exercised collectively through a union, that is the heart of collective bargaining. As the Court said in *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 489:

"The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side. One writer recognizes this by describing economic force as 'a prime motive power for agreements in free collective bargaining.'"

As accurately stated in the Senate Report at the time of passage of the Taft-Hartley Act:

"The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement." S. Rep. No. 105, 80th Cong., 1st Sess. p. 16.

As above stated, the right of the individual to bargain about the terms upon which he will perform the services which he has to offer is simply a concomitant of his power to withhold those services. Where his services are unwanted, his power to withhold them is meaningless. He has no con-



comitant right to force them upon the employer or to insist that the employer bargain for their performance, and the Board, in holding that a union is entitled to required bargaining about the utilization of services which the employer does not want, has held that the bargaining representative is entitled to exercise on behalf of those whom it represents a right which they do not possess.

The Board's decision is the product of a mistaken notion as to the powers and function of the bargaining representative. Selection of a bargaining representative simply collectivizes the bargaining positions of the individuals and requires that the employer deal with the chosen representative. In the words of this Court:

"The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." *J. I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944).

An employer may not by-pass the bargaining representative and deal with the employees directly, for since the obligation to deal with the chosen representative is exclusive, "it exacts the negative duty to treat with no other." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 682-684 (1944); see also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937). But the exclusive power to exercise collectively the rights of the individuals does not confer upon the bargaining representative rights which the individuals do not possess. The status of a bargaining representative is analogous to that of a guardian of the person. An employer desiring the services of a ward must bargain with the guardian, rather than the ward, as to the terms and

conditions of employment, but if the employer does not want the services, there is nothing to bargain about and he need bargain with no one.

Where an employer wishes to continue a part of the operations embraced by the bargaining unit and thus has need of a part of the services controlled by the bargaining representative, the power to withhold the services which are needed may provide a basis upon which to bargain for utilization of the services which are unwanted. But where, as here, all of the operations embraced by the unit are discontinued and the unit thereby extinguished, there exists no such basis for bargaining. We submit that a union's power to withhold services does not carry with it a right to require bargaining for the utilization of those services by an employer who does not want them. The language of the Act imposes no such requirement, and neither does its rationale.

**II. The Board's order that Petitioner resume the performance of operations which had been discontinued for legitimate business reasons and that it reinstate the individuals who had been employed therein violates section 10(c) of the Act and is punitive.**

This is the first instance in the history of the Act in which the Board has ordered reinstatement in a case involving only a refusal to bargain.<sup>18</sup> It also is the first instance in which the Board has ordered the resumption

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18. In the past, the remedy for a refusal to bargain had been simply an order requiring bargaining. Thus, where an employer moving his plant violated his duty to bargain regarding placement of affected employees (tenure of employment), the employer was ordered only to bargain regarding such placement (see, e.g., *Brown Truck & Trailer Mfg., Inc.*, *supra* p. 14) and sometimes even this remedy was denied. (see e.g., *Bickford Shoes, Inc.*, *supra* p. 15). Even after its dictum in *Town & Country Manufacturing Co.*, the Board, in *Renton News Record*, *supra* p. 21, declined to require the employer to resume its discontinued type-setting operations and

of operations which have been discontinued for legitimate business reasons.<sup>19</sup>

While its novelty does not of itself condemn the remedy, the fact that it took the Board twenty-seven years to discover it invites a scrutiny which it will not withstand. The order, we submit, violates section 10(c) of the Act (29 U.S.C. § 160(c)), and is punitive rather than remedial.

**A. In requiring reinstatement of employees terminated for legitimate business reasons, the order violated the Act's express prohibition of compulsory reinstatement of employees terminated for cause.**

Section 10(c) of the Act contains the following provision, added in 1947 (29 U.S.C. § 160(c)):

"No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause."

In ordinary usage, the word "cause," when employed (as it is in the foregoing provision) to refer to that which

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reinstates the individuals who had been employed therein for the reason that such an order would be "punitive" (136 NLRB at p. 1298). See also *Lori-Ann of Miami*, *supra* p. 17, where the employer was ordered only to bargain.

19. Even where the discontinuance of operations was itself "discriminatory" and violative of Section 8(a)(3) of the Act, it was the Board's normal practice, not to order resumption of the operations, but to order only that the terminated employees be placed upon a preferred list for reemployment in the event of a voluntary resumption of the operations. See, e.g., *New Madrid Manufacturing Co.*, 104 NLRB 117 (1953), enf. granted in part and den. in part, 215 F.2d 908 (8th cir. 1954); *Barbers Iron Foundry*, 126 NLRB 30 (1960); *M. Yoseph Bag*, 128 NLRB 211 (1960), 139 NLRB No. 108 (1962). In *Darlington Manufacturing Co.*, 139 NLRB No. 23 (1962), which was decided after *Town and Country Manufacturing Co.* and in which a plant had been closed in violation of Section 8(a)(3), the Board did not order that the plant be reopened, but ordered only that the employees who had been terminated be placed upon preferred lists for employment at other plants. The Court of Appeals of the Fourth Circuit denied enforcement even of this order (325 F.2d 682 (1963)) and this Court has granted certiorari, 377 U.S. 903 (1964).

induces given action, is synonymous with "reason." Webster's International Dictionary (2d Ed. 1959). The legislative history of the provision reveals that it was intended to refer, not merely to individuals discharged for misconduct, but to individuals discharged for any legitimate reason—or, to be more specific, for any reason other than participation in activity protected by section 7. As Senator Taft explained it on the Senate floor, there were, for the purposes of the remedial provisions of the Act, just two kinds of discharge: discharges for "union activity" and discharges for cause. The Board was to be empowered to order reinstatement in the one kind of case but not in the other.

"All this language does is simply to say exactly what the present rule is. *If the Board finds that the man was discharged for cause, that is one possible outcome. If it finds that he was discharged for union activity, that is the other outcome.* The Board must determine the facts in every case. For years it has had to determine in every case whether a man was discharged for cause or for union activity. In my opinion this language in no way changes the existing provision of law . . ." 93 Cong. Rec. 6518 (1947); emphasis supplied.

The existing law to which Senator Taft referred had been expounded by this Court in *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, and in *Associated Press v. NLRB*, 301 U.S. 103; both decided on the same day in 1937. In *Jones & Laughlin*, the Court had said:

"The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled

to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." 301 U.S. at 45, 46.

And in *Associated Press*, it had said:

"The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees . . . The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever its relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible." 301 U.S. at 132.

See also *NLRB v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939).

The Board has found in the present case that Fibreboard did not terminate its maintenance employees because of their union membership or to interfere with, restrain or coerce them in the exercise of their rights under the Act, but that it terminated them for legitimate business reasons. Senator Taft was not asked specifically whether section 10(c) would permit enforced reinstatement of an individual discharged for legitimate business reasons, but his explanation leaves no doubt (and could have left none in the minds of his colleagues) as to how he would have answered such a question. If a discharge was not for what he termed "union activity," then it was for "cause" and the Board was to be without power to reinstate.

8. The Board's order was punitive rather than remedial and exceeded its powers for this reason as well as for the reason just stated.

By the terms of the Board's order, Petitioner must terminate its contract with Fluor Maintenance Company, resume performance of the maintenance operations, and reinstate

the individuals formerly employed therein with back pay to the date of the order. It is then to bargain with the Union, after which it "may, of course, lawfully subcontract its maintenance work" (R. 25).

The order was based upon the following premises: (1) that "No genuine bargaining over a decision to terminate a phase of operations can be conducted where that decision has been made and implemented," (2) that "the loss of employment stemmed directly from their employer's unlawful action in by-passing their bargaining agent," and (3) that the order does not impose an "undue or unfair burden on Respondent." (R. 25, text and note 19.)

We do not know why there can be no "genuine bargaining" without an award of back pay. Such an award has no bearing that we can see upon ability of the parties to bargain effectively and, we submit, it is not in aid of bargaining.

Nor do we know why there can be no "genuine bargaining" without a prior resumption of operations and reinstatement. Petitioner, it has been found, is interested in operating profitably, not in discriminating against the Union or its members. If the Union has something to propose that might be attractive to Petitioner, there is nothing in the circumstances presently existing that would preclude such a proposal from receiving consideration as favorable as that which it would receive after enforced resumption by Petitioner of the maintenance operations.

Indeed, the requirement that bargaining be preceded by a resumption of operations and reinstatement is self-defeating. No man worth his salt would have failed to secure other employment during the three years which had elapsed between his termination and the Board's order. And no such man would consider leaving that employment to return



to Petitioner at 1959 wage rates and with knowledge that Petitioner, after an appropriate interval of bargaining, might again contract out the work and leave him without a job. He would consider leaving his present employment to return to Petitioner only if and when Petitioner and the Union had struck a bargain for the payment of an attractive wage rate and providing reasonable assurance of something more than purely temporary employment. The Board, in requiring that bargaining be preceded by a resumption of operations and reinstatement, has required that the horse be preceded by the cart.

Nor is there any basis in the record for the Board's assertion that "the loss of employment stemmed directly" from the refusal to bargain. That assertion assumes that bargaining would have resulted in abandonment by Petitioner of its plan to contract out the work. The Board might with equal justification have assumed that bargaining would have resulted in acceptance by Petitioner of the Union's wage and other demands. There was no more warrant for the Board's assumption that bargaining would have resulted in abandonment of the plan to contract out the work than there was for a similar assumption which caused this Court to overturn a Board order in the completely analogous case of *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).<sup>20</sup> See also *Carpenters Local 60 v. NLRB*, 365 U.S. 651 (1961).

The court below speculated that "the union, after hearing management's side of the problem, . . . might proffer a six months trial period in which either productivity would be increased with the existing force of 73 men or maintained

20. An order that the employer cease giving effect to certain contracts with the International Brotherhood of Electrical Workers was vacated by this Court because based upon the "unwarranted assumption" that "the contracts were the fruit of the unfair labor practices" (305 U.S. at 238).

with a reduced force to effect the economies desired by management" (R. 177). But the fact is, as the Board found, that the Union *did* hear management's side of the problem<sup>21</sup> and that it made no proposal such as that which the court below envisioned.<sup>22</sup> Nor does the record suggest that such a proposal, if it had been made, would have been acceptable to management; the Union had already had a "trial period" of more than twenty years (R. 46) during which management's repeated efforts to obtain its cooperation in effecting a reduction in costs had been fruitless.<sup>23</sup> The evidence con-

21. The Board adopted as its own the Trial Examiner's findings that Petitioner's Director of Industrial Relations reminded the Union's negotiating committee "that during the bargaining negotiations in previous years he had, with the use of charts and statistical information, endeavored to point out 'just how expensive and costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant' and that as late as 1958, he had stated to the negotiating committee, again with the aid of charts, Respondent's problem of high costs" (R. 53-54), that he told the committee "that certain other unions representing Respondent's employees 'had joined hands with management, thereby bringing about an economical and efficient operation,' but the Steelworkers, even though asked to do so, refused to cooperate in attempting to reduce maintenance costs" (R. 54), and that after reiterating his statements "about the 'high cost' problems management had in the plant," he told the committee "that Respondent was convinced, after considering the matter for 'quite a period of time,' that it was more economical to have some independent contractor perform the maintenance work instead of continuing to perform that work with its own employees" (R. 54).

22. Although the Union found opportunity to propose amendment of its bargaining contract to require that the independent contractor employ its members (R. 54), it made no proposal bearing upon a reduction in costs, but took and adhered to the position that its bargaining contract had been automatically renewed subject only to an obligation upon the part of Petitioner to bargain upon its demands for modifications (R. 51, 53) which involved increases in all cost items in the contract (R. 61). The cost savings involved in letting work to a specialized maintenance contractor serving more than one plant in the area is the result, not merely of lower wage rates (the contractor's wage rates may, or may not, be lower), but of a flexible work force and specialized management and supervision (R. 139-141). It was not within the Union's competence to offer anything more than reduced wages, and it did not offer even this.

23. See note 21, *supra*.

tains no indication that bargaining would have resulted in abandonment by Petitioner of its plan to contract out the work, and the Board did not, as required by section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)), state findings of fact and reasons therefor which would support such a conclusion. Speculation, without basis in the evidence or findings, that bargaining would have had one outcome rather than another is, we submit, not a proper basis for a Board order. See *Consolidated Edison Co. v. NLRB* and *Carpenters Local 60 v. NLRB*, both *supra*.

As for the Board's assertion that its order imposed no "undue or unfair burden" on Petitioner, the fact is that it required Petitioner, after the lapse of three years and laboring under the recruitment difficulties above mentioned, to rebuild a supervisory and working force with which to resume, with no prospect of reduced costs, the performance of an operation which had been abandoned as too costly.

An order which goes beyond what is required to undo a wrong is punitive rather than remedial and exceeds the Board's powers. *Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940); *Consolidated Edison Co. v. NLRB*, *Carpenters Local 60 v. NLRB*, both *supra*. The only wrong (if it was a wrong) of which Petitioner was convicted was a refusal to bargain about whether it should let the maintenance work to an independent contractor. All that was necessary to undo that wrong was an orthodox order that Petitioner bargain. The requirement that bargaining be preceded by a resumption of operations which had been abandoned as too costly and by reinstatement with back pay of employees who had been terminated because their services were no longer needed is, we submit, punitive.

**CONCLUSION**

We submit that the Act does not require an employer to bargain about whether to let work to an independent contractor rather than carry it on himself. Its language does not require that he bargain about whether he shall carry on particular operations, but requires only that he bargain about the "wages, hours, and other terms and conditions" upon which men are to be employed in those operations upon which he decides.

We further submit that the order requiring that Petitioner resume its maintenance operations and reinstate with back pay the individuals who had been employed therein exceeds the Board's powers. It violates the express prohibition of compulsory reinstatement of employees terminated for cause and, furthermore, is punitive rather than remedial.

We submit that the Supplemental Decision and Order should be denied enforcement and should be vacated.

Respectfully submitted,

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**(Appendix Follows)**

## **Appendix**

### **STATUTES INVOLVED**

#### **National Labor Relations Act**

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to

rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

• • • • •

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ."

• • • • •

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the



employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .”

• • • • •  
“Sec. 10.

• • • • •  
“(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . .

**Administrative Procedure Act**

• • • • •  
“Sec. 8.

• • • • •  
“(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative

agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1964

No. 14

**FIBERBOARD PAPER PRODUCTS CORPORATION, *Petitioner***

**v.**

**NATIONAL LABOR RELATIONS BOARD, *Respondent***

**BRIEF AMICUS CURIAE OF THE  
ELECTRONIC INDUSTRIES ASSOCIATION  
IN SUPPORT OF PETITIONER**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1964

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No. 14

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FIBREBOARD PAPER PRODUCTS CORPORATION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

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**BRIEF AMICUS CURIAE OF THE  
ELECTRONIC INDUSTRIES ASSOCIATION  
IN SUPPORT OF PETITIONER**

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**THE FIBREBOARD CASE**

In April, 1962, the National Labor Relations Board laid down for the first time as a general proposition, that Section 8(a)(5) of the National Labor Relations Act unconditionally requires an employer to consult with his union representative before deciding to subcontract work being done by bargaining unit employees. As the Board put it,

"In *Fibreboard Paper Products Corporation* (130 NLRB 1558), the Board held that an employer, which unilaterally subcontracts a portion of its operations for economic reasons, does not violate Section 8(a)(5) of the Act by failing to notify and negotiate with the

representative of its employees with respect to this decision. . . . Upon reconsideration of the *Fibreboard* opinion, we are now of the view that it unduly extends the area within which an employer may curtail or eliminate entirely job opportunities for its employees without notice to them or negotiation with their bargaining representative. . . . The elimination of unit jobs albeit for economic reasons, is a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act."<sup>1</sup>

The Board then proceeded to reconsider the actual *Fibreboard* case referred to above, and in September, 1962, found that *Fibreboard* had violated Section 8(a)(5) three years before<sup>2</sup> by unilaterally subcontracting its maintenance work without bargaining with the charging unions over its decision to do so.<sup>3</sup>

Few Board decisions in recent years have evoked such controversy, or have sent Board members to the public rostrum with such frequency in defense of their policy. The Electronic Industries Association has followed closely this case, and a growing number of related cases involving the same basic issues. With each new decision, the conviction has grown that an erroneous application of the National Labor Relations Act is taking place. Accordingly, the Electronic Industries Association, in discharging its responsibility to its members, considers it most important that this Court have full opportunity to understand the reasons for adverse management reaction to the Board's decision in *Fibreboard II*.

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<sup>1</sup> *Town & Country Mfg. Co., Inc.*, 136 NLRB 1022 @ 1027.

<sup>2</sup> The 8(a)(5) charge in *Fibreboard* was filed on July 31, 1959 (130 NLRB 1558 @ 1565).

<sup>3</sup> *Fibreboard Paper Products Corp.*, 138 NLRB 550 (hereafter referred to as "*Fibreboard II*").

### INTEREST OF THE AMICUS CURIAE

The Electronic Industries Association (herein referred to as EIA) is composed of approximately 300 member companies engaged in the manufacture of electronic equipment and components. It is the national association representing the fifth largest manufacturing industry in the United States, with gross annual sales in excess of \$15 billion. The vast majority of its members deal with the Department of Defense as prime contractors, subcontractors, or both. An electronics firm acting as prime contractor for a major weapons system, awards literally thousands of subcontracts in accordance with the provisions of the Armed Services Procurement Regulations. In fact, the variety and complexity of electronic products is such that many firms are often prime contractors on one or more Government orders, while also serving as subcontractors on a number of others.

No manufacturing company—and *a fortiori*, no company in electronic manufacture—attempts to produce its products completely on its own. With the almost unlimited complexity and variety of electronic components, the degree of interdependence within the electronic industry is particularly acute. And this relationship of any particular electronic manufacturer to his suppliers, in his decisions to make or buy, is the same subcontracting relationship which the Labor Board now seeks to regulate and control in *Fibreboard II*.

**A. Defense business is placed chiefly with relatively few prime contractors, who must then depend upon thousands of subcontractors in order to perform.**

A recent Department of Defense report shows that defense contracts in the first instance are largely placed with a relatively small number of prime contractors. Considering all such contracts of \$10,000 or more in fiscal year 1963 (July 1962 through June 1963), the report indicates that:

- (1) Nearly three quarters of the total dollar value (73.9%) went to only 100 companies;

- (2) Over half the defense dollars (51.9%) went to just 25 such suppliers; and
- (3) Five top companies alone accounted for nearly one quarter (23.2%) of all such defense awards.<sup>4</sup>

This concentration occurs because of the sheer size of the prime awards, and the need for unified management direction on individual projects. *Through subcontracting*, however, substantial portions of this work are then spread out to hundreds, sometimes thousands, of participating firms. In fact the contract for a complex military and space system obviously could not be accomplished without the interlocked effort of such contractors, each producing a share, with the prime contractor to distribute, and then reassemble the combined effort.

**B. Congress, in the national interest, has required and favored widespread subcontracting.**

As stated by Congressman Abraham J. Multer of New York, Chairman of the Subcommittee on Government Procurement of the House of Representatives Select Committee on Small Business, at the opening of Subcommittee hearings on November 12, 1963,

"Our Government is the largest purchaser of goods and services in the American market, and the manner in which it exercises this function profoundly affects our economy and people. It must, therefore, exercise this function with wisdom and foresight to the end that it will not capsize our free enterprise system. There is no profit in gaining the world and losing our democratic soul." (Report of Hearings, p. 3)

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<sup>4</sup> "100 Companies and their Subsidiary Corporations listed according to net value of military prime contract awards, fiscal year 1963," issued by Office of the Secretary of Defense. Cf. Introductory statement of Report: "... a substantial part of the prime contract work of companies on the 100 Company list is subcontracted to other concerns. About one-half of the military work of the large concerns is subcontracted, and over one-third of the amount subcontracted is paid to small business concerns."



Congress and the defense procurement agencies have been vigilant in assuring that the centralization of responsibility and authority obtained by using a large prime contractor does not result in unreasonable economic concentration. The national interest has also required that the production skills and economic benefits of these contracts be shared and distributed between different geographic regions, so that essential defense production does not depend upon, or benefit, merely one source or one isolated area.

Therefore, Congress has provided specifically for widespread *mandatory* subcontracting, not only within the major prime contract awards, but also at every intermediate subcontract level where severable portions of the work can be effectively distributed. The details of these Government policies, as they are affected by *Fibreboard II*, will be discussed in detail at Section IV of the Argument below. Some concept of the extent of subcontracting in defense work as a result of these policies can be obtained from the statistical table in the Appendix.

**C. In Electronics manufacturing, subcontracting is an essential way of life, creating serious management problems if *Fibreboard II* prevails.**

Products manufactured by the electronics industry unquestionably include the most advanced, complex, and sophisticated devices known to our industrial civilization. Simply in sheer number, intricate precision parts for one computer alone can be in the order of hundreds of thousands, and the incredible variety of individual parts will illustrate every conceivable industrial art from glass blowing through ceramics to machining in millionth tolerances, the vacuum densities of outer space, and metal refining to exotic degrees of purity.

Most electronics manufacturers are capable of handling special—frequently, substantial—portions of this work. No company has, or considers it feasible to have a totality of the talent or the productive capacity required for the manufacture of a complete integrated weapons system.

Every defense order for an electronic system thus represents an ultimate integration of the skills of many defense companies in and out of the electronics industry, through make-or-buy policies which affect subcontracting decisions.

Naturally, as the complexity of a product or industrial process increases, the web of such "make-or-buy" relationships markedly increases, and the impact and significance of decisions to make or to buy any particular part, component or service becomes increasingly greater.

To understand the impact of *Fibreboard II* upon the electronic industry, and particularly as affected by the Government's defense procurement procedures, it is necessary to comprehend the path of a defense order from inception through final assembly for delivery as an end item.

Complex military electronic systems are strictly "custom" made; a Defense agency invites bids and competing firms submit proposals. Even at the proposal stage, the question of subcontracting is paramount, and the bid must frequently disclose anticipated use of specific subcontractors. A typical illustration would be a bid for a radar system, in which the bidder proposed to use another electronics manufacturer for his amplifier circuit packages. The reason for such utilization could be quality, price, schedule, or all three. Although the same work could be done by the prime bidder, these or other reasons, in this instance, might dictate the utilization of an alternate outside source. Such outside source provisions are part of almost every electronic proposal of even moderate complexity.

If the contractor's bid is successful, the contract will then be awarded by the government on the condition that such amplifier packages be subcontracted in accordance with the proposal submitted. This raises several management questions:

Is *this* a subcontract which must be discussed with the bargaining representative, per *Fibreboard II*? Must it be discussed before the proposal is submitted? (Perhaps only one out of five or ten proposals will result in an actual order!) Must it be discussed after the bid is approved? (The approved bid will require that such subcontracting take place.) Clearly, an affirmative answer to either question will introduce startling new elements and concepts into defense procurement. If the potential subcontract aspects of defense proposals must be union-cleared before submission, the implications of such a requirement would not only increase the time required for bid preparation beyond reason, but also increase the cost of such bid preparation to the point of restricting the number of suppliers available to the Government.

At the level of normal decision making, after a contract has been awarded, the problems of *Fibreboard II* continue to plague.

A firm deadline for delivery, based upon national security goals, and established by the Department of Defense, is a critical element of every such contract. Schedule problems may indicate that the only sure way to achieve the timely performance required is through selective subcontracting. Must a decision to subcontract now be reviewed with the bargaining representative first? How much critical time must be lost in the debate?

And how is management to prepare for such debate? Is the union also entitled to full education on all of the factors which prompt a subcontracting decision, in order to permit such a debate to be valid? Can such an education be given in less than the time that is needed for contract fulfillment? Or can such education be given effectively in the absence of a background in manufacturing experience and decision making?

Can the union, as a trustee of *employee* interests only, be fairly asked to assume *management* responsibility in a complex of decisions where national defense, and not the immediate interests of employer or employee are paramount, and where the fast moving pace of decision requires, not debate, but immediate action?

These are only the immediate questions that management foresees from a literal reading of *Fibreboard II* and the later cases in which the Labor Board has carried out its new concepts of bargaining duty.

**D. How the rule in *Fibreboard II* would affect just one aspect of manufacture, with respect to one electronic product.**

The sheer volume of day-to-day make-or-buy activity in one electronics firm is far beyond the conception of even the ordinary business man. Considering the number, variety, and diversity of electronic components, a volume of over a thousand such decisions per working day in one electronics plant is not unusual. Each such decision involves precisely the type of consideration which *Fibreboard II* forcibly subjects to prior bargaining at union whim.

Leaving this larger picture, consider the requirements for one electronic product—a navigation system for a long-range submarine. This is a relatively compact unit, designed with the maximum economy of space that a submarine obviously requires. In complexity it is not to be compared even with many major airborne systems. Nevertheless, the product design for this relatively simple unit involves approximately . . .

- 5,000 separate engineering drawings,
- 530 individual sub-assemblies, and
- 3,300 separate parts; of which
- 1,300 alone are parts to be made by cutting out metal in a machine shop.

All 3,300 parts require decision to "make" or to "buy"—but to keep this illustration in simplest terms that can be readily understood without specialized electronic knowledge, consider only the 1300 metal parts that have to be machined.

In some instances, the part will be relatively simple to make in the company's own plant, but the immediate time schedule will not permit using existing facilities that are already loaded with other work having equal priority. In other cases, the part can be readily made in-plant on existing machinery, in units of one or two, but for a larger quantity, automatic machinery available only through an outside supplier may permit quantity duplication of 50 or 100 at lower cost, and with greater standardization of quality than hand production. In such case, it would not represent good value to the company, or to the government to make such a part in the plant.

Again, engineering requirements may also require unusual plating or finishing operations not economically available except through an outside specialist, so that subcontracting of at least these operations is obviously required.

Now the point about all this is that the machine shop items alone, for this *one* non-major product, require 1,300 separate decisions, and each such decision represents its own small universe of complexity, in which many variable shifting factors such as machine load and alternate availability of other processes must be evaluated against another paramount and overriding factor—getting a vital defense job done *on time* to meet the contract schedule.

*Each* of such 1300 machine shop decisions on this one order will affect directly the status of individual job opportunities in the plant which secured the order. To this extent, these decisions come directly within the literal terms of the Board's holding in *Fibreboard II*.

Moreover, 1300 such decisions by plant management on just one phase of a single typical order are but one segment of a total plant operation, and the decision making process is practical, not judicial. Matters are decided on the spot. Decisions are unmade and remade from day to day as the workload picture changes, as bottlenecks develop, and made with increasingly peremptory decisiveness as production deadlines approach. At times, it may be better to use a temporary idle capacity for hand-type work at least semipproductively, on parts that normally could better be made on automatic machinery. At other times, it may be better to pay high premiums for outside manufacture of one or two parts that could readily be made in the shop rather than risk disrupting existing production schedules, or take a chance of slowing down assembly lines that would be idled if the part were missing.

To act with such speed and decisiveness obviously requires many years of practical experience on the part of knowledgeable manufacturing, machining and production engineers and executives, carefully trained and screened for the task. But it leaves no time whatever for documentation or debate with union representatives. In most instances it will be totally impossible to reconstruct exact motivation at a later date, or subsequently justify in law court terms whether any individual decision to manufacture or subcontract should or should not have been made.

#### **E. Practical absurdity of imposing the literal terms of Fibreboard II on real life.**

In everyday business, these operating-level decisions to subcontract or not are made with expertise rather than formal preliminary deliberation. Primarily, they are informed *risk* decisions, the assessment of which will constantly change from day to day as a machine shop load fluctuates. Job orders first planned for shop manufacture will continually be diverted to a subcontractor and jobs



scheduled to be subcontracted will be recalled to fill vacancies in shop work load, with never-ending frequency.

In fact, a well designed manufacturing facility will maintain in-house only the machines and capacity for a reasonably predictable volume of current work. Excess plant and capacity that will be used only for peak load situations or spasmodic orders is normally avoided, and the key to successful operation lies in this precise ability to shift rapidly from in-house to subcontract and back.

Yet it is this exact situation of *peremptory* subcontracting, undebatable by its very nature, which the Labor Board language has now branded illegal if not submitted to prior discussion.

The very concept of discussion, when applied to this volume, complexity, and time pressure, is totally unreal. It is precisely the difference between driving a car, and back-seat driving.

Yet, if debate were to be required—and *Fibreboard II* has paved the way for debate at union whim—each such decision is the very grist for sharp, prolonged debate. Not one of these 1300 decisions can go one way, rather than the other, without directly expanding or contracting the job opportunities available to one skill or another in the shop.

To further compound unreality, *Fibreboard II* presupposes an area of accommodation between opposing interests where no area of agreement can honestly be expected to exist. It is simply not the union's business to adopt an employer's point of view, or to be asked to agree upon matters which have been relegated to management's responsibility under a government contract.

The union is concerned, not with the enterprise as a continuum, but only with that aspect of the enterprise

which furnishes *immediate work to those here and now employed*. The good of the firm does not become a union concern unless that good results in more work, not less, *for that particular trade or skill* which the union represents. The pressure of manufacturing deadline is a totally unpersuasive factor to the union being consulted, if the employer proposes that another firm or union will do the work to meet that deadline.

This debate is not to be compared with collective bargaining over the level of wage rates, where it is a question of more or less, not all or nothing. In wages some accommodation must be found. The employer needs the men, and the men need the jobs. In subcontracting there is little or no room for accommodation. To management it is a question of cost, of quality, and at the shop level, primarily a question of production deadlines, and of other departments waiting for the finished work. To the union, it will be all black and white, work versus no work, and *it is not the business of a union to keep a company alive at union expense*.

#### **F. Impact on Electronic Industry as a whole.**

This is merely a surface review of the obvious problems involved in just *one* phase of the manufacture of parts, for *one* electronic system of limited size, used in but *one* phase of the defense program. In relative monetary cost, it would not even be noticed among the defense purchases for a single year.

But the pattern it represents is characteristic of electronic manufacture throughout, and to understand the depth of the Electronic Industry's concern with *Fibreboard II*, these 1300 isolated decisions to make or buy on this limited phase of this one program must be multiplied by *all* the hundreds of electronic programs at each of the hundreds of firms represented by EIA.

Total factory sales of the U. S. Electronics Industry are estimated at over \$15 billions annually. Of this amount,

nearly \$9.5 billions are sold to the Federal Government for military and space programs.<sup>5</sup> These programs are at the heart of our defense effort, representing the coordinating nerve-links of communications, computation, and intelligence, without which the entire defense force could neither be mobilized nor deployed.

The question must then be asked again, how, ~~even~~ if *Fibreboard II* represented the understood practice of bargaining as worked out in industry and sanctioned by Congress, could such duty be fulfilled by everyday men in an everyday way without slowing the pace of decision to a crawl, or causing the expense of the defense effort to the country and its taxpayers to be magnified beyond reason?

**G. Whiplash effect of Fibreboard II—a major business advantage to non-union firms.**

Finally, for the first time the economic position of the union versus the non-union electronic manufacturer would become a matter of *substance* in the ability to compete.

<sup>5</sup> For the fiscal year 1965, the electronic portions of the defense dollar are estimated as follows:

	<i>Total Obligations</i>	<i>Electronics Portion</i>	<i>Electronics Percentage</i>
Department of Defense			
Procurement (missiles, ships, planes, guns, etc.)	\$14,785,000,000	\$4,419,000,000	29.9%
Research and Development	6,580,000,000	2,040,000,000	31.0%
National Aeronautics & Space Administration			
Research and Development	4,365,000,000	1,450,000,000	33.2%

In addition, over 5% of nearly \$28 billion for utilities, construction, operation, and maintenance, or \$1,538,000,000 in fiscal '65 is also committed to electronics, making total defense electronics sales \$9,447,000,000.

Source: Electronic Industries Yearbook, 1964, EIA; Conference Report, National Aeronautics & Space Administration budget, Senate-House Appropriations Committee, August 1964.

Until now such differences have been largely verbal. The non-union manufacturer in the same labor market using the same skills has been forced to pay the same or better wages than union plants for equal work. The relative level of employee benefits, area for area and plant for plant, between union and nonunion electronic manufacturers has not resulted thus far in any significant diversion of business either way.

But with the imposition of *Fibreboard II*, a wholly new factor is now introduced. Not only must an employer bargain over his wage package—he must also now bargain over the way he proposes to conduct his business, and if the union wishes, about each of his business decisions one by one as they are made.

His *reaction time*—the vital difference, so often, between economic viability and failure, is slowed to a point that will give the non-union firm a new significant edge.

This, ultimately, can only further impede the very goals for which labor is striving.

### THE ISSUE

**Fibreboard II Makes Illegal all Management Decisions that may Affect Working Conditions. Unless the Union has been Consulted in Advance.**

This is a broad statement, but *Fibreboard II* and the later Board decisions do not permit narrower construction.<sup>6</sup>

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<sup>6</sup> It should be emphasized here that this brief and the problem to which it is addressed concerns only situations untainted by illegal or anti-union motivation. In the present case, such question is completely removed by the decisions of the Board and Court below, and by denial of certiorari by this Court on that aspect. Where the motivation can be fairly shown to be improper, the EIA takes no position in this brief.

**I. The Board's order is written to cover all unilateral action.**

There is, first of all, the remedial order under review in this case, which unconditionally requires that:

"Fibreboard Paper Products Corporation, Emeryville, California, its officers, agents, successors, and assigns, shall . . . Cease and desist from . . . unilaterally subcontracting unit work or otherwise unilaterally changing the wages, hours, and other terms and conditions of employment of unit employees without prior bargaining with the above-named Unions . . . (138 NLRB 550 @ 555-556)

Board Member Rodgers (since replaced), in his *Fibreboard II* dissent, characterized this majority ruling as follows:

"If this ruling of the majority stands, it is difficult to foresee any economic action which management will be free to take of its own volition and in its own vital interest (whether it be the discontinuance of an unprofitable line, the closing of an unnecessary facility, or the abandonment of an outmoded procedure) which would not be the subject of *mandatory bargaining*." (138 NLRB 550 @ 559-560)

The reply of the majority in no way challenged that the sweep of their ruling was this broad, but merely asserted that they were

"... confident that those employers and unions who are bargaining in good faith will find it neither difficult nor inconsistent with sound business practices to include questions relating to subcontracting in their bargaining conferences." (138 NLRB 550 @ 554)

**II. In other cases, the Board is applying the *Fibreboard II* principle as broadly as stated.**

The immediate case before this Court involves subcontracting of existing work. But there is no logical reason to presuppose that the Board's order is limited to that one situation. In fact, we know it is not so limited,

from the catalog of areas in which management is being now called upon to answer to the Board for its unilateral decisions.<sup>7</sup>

Reference	Company	Activity
136 NLRB 1294	<i>Renton News</i>	Substitution of offset printing for letterpress printing.
137 NLRB 418	<i>Montgomery Ward</i>	Realignment of truck routes.
137 NLRB 1099	<i>Lori Ann</i>	Going out of business.
140 NLRB 256	<i>Weingarten</i>	Sale of branch stores.
28 CA 958 (IR) <sup>8</sup>	<i>Kennecott Copper</i>	*Repair of a machine.
6 CA 2756 (IR)	<i>Westinghouse</i>	*Routine maintenance decisions (over 100 subcontracts or purchase orders at one plant per year).
2 CA 9619 (IR)	<i>Mirror</i>	Sale of business.
13 CA 5611 (IR)	<i>American Oil</i>	*Installation of 3 metal doors. *Removal of sludge.

\* Recommended findings specifically note that no unit employees were terminated as a consequence of the unilateral action under review.

### III. Unlimited definition of "terms and conditions of employment" enlarges effect of *Fibreboard II* still further.

A direction to refrain from "unilaterally changing . . . terms and conditions of employment of unit employees without prior bargaining"<sup>9</sup> thus appears to mean that management must on its own initiative consult the union first on every phase of management activity that affects employees, from the installation of fans and water coolers<sup>10</sup>

<sup>7</sup> These cases are intended to show the scope of *Fibreboard II*. In some of these cases, management has been acquitted for the present of illegal activity. Others are at intermediate levels, awaiting Board decision. But in each case, the area of management activity now subjected to specific scrutiny as a result of *Fibreboard II* is further illustrated, and management fears for the extent to which the principle of *Fibreboard II* will be applied are further justified.

<sup>8</sup> "IR" is a recent Intermediate Report of an NLRB Trial Examiner, released for publication by National Labor Relations Board.

<sup>9</sup> 138 NLRB 550 @ 556.

<sup>10</sup> *Sherry Manufacturing Co. Inc.*, 128 NLRB 739.



to subcontracting<sup>11</sup> and the substitution of new production process.<sup>12</sup> The alternative is a violation of Section 8(a)(5).

If this, without qualification, is the literal obligation of management (and the Board's statement of this obligation in *Fibreboard II* is totally unqualified), then every employer in every organized industrial plant is today refusing to bargain at each moment that his operation continues. Management simply cannot manage, without at every step continually affecting employees' working conditions. The normal industrial plant is a beehive of such activity. Departments are continually relocated; machinery rearranged; walls repainted; equipment replaced or repaired; washrooms refurbished, with unit impact involved at every turn.

Even the sudden opening of a window may have potential unit impact, as this very Court has recognized.<sup>13</sup>

On this basis, and under the Board's new rulings, it would be literally impossible to say as a matter of law that any such management action affecting employees, favorable or unfavorable, and no matter how trivial, if taken without prior consultation, does not thereby *and at that point* constitute a technical violation of Section 8(a)(5).<sup>14</sup>

What is more important, the power of the Board is then available to the union, under *Fibreboard II*, to restore the *status quo*, no matter how unreal.

<sup>11</sup> *Fibreboard II*, supra.

<sup>12</sup> *Renton*, supra.

<sup>13</sup> See reference to "sudden drafts of heat, cold, or humidity" in footnote No. 2, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593.

<sup>14</sup> In logic, such a technical violation should occur every time job opportunities are *improved* without bargaining, as well as when they are curtailed, on the same premise that a unilateral wage increase constitutes an 8(a)(5) violation. Thus under *Fibreboard II*, a decision to take on new work and increase employment should equally require prior bargaining, if NLRB is to pursue a consistent course of statutory interpretation.

We submit that, this analysis leads to a situation that is equally unreal, yet is inescapable in the light of the language which the Board has used, and inescapable in the light of the specific cases following out this new pattern of interpretation.

### THE ARGUMENT

In opposing the Board's rule in *Fibreboard II*, EIA is seeking to uphold established law, to assure fair and equitable administration of the National Labor Relations Act, to prevent a serious inconsistency with other Acts of Congress relating to defense supply, and to reconcile conflicting governmental policies affecting business in a manner consistent with free enterprise.

#### **I. AN ALL-INCLUSIVE AND UNCONDITIONAL REQUIREMENT FOR PRIOR BARGAINING OVER DECISIONS AFFECTING UNIT EMPLOYEES HAS NO BASIS IN LAW.**

As we have noted, the operative language in *Fibreboard II* equates the unilateral with the non-legitimate:

"We have found that Respondent violated Section 8(a)(5) by unilaterally subcontracting maintenance work without bargaining with the Charging Unions over its decision to do so. We shall therefore order that Respondent cease and desist from unilaterally subcontracting unit work or otherwise making unilateral changes in their terms or conditions of employment without consulting their designated bargaining agent."<sup>15</sup>

The inescapable sweep of the Board's ruling thus encompasses, without qualification, literally every decision that management may take with reference to the operation of its business.

EIA submits that this directive is patently too broad, and contrary to both law and common sense.

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<sup>15</sup> *Fibreboard II*, supra, @ 554.

**\* A. The act does not interfere with the normal rights of an employer.**

After nearly 30 years of operation, the underlying statutory objective and constitutional basis for the National Labor Relations Act is no longer kept in daily sight. But that Statute was—and is—an Act for the protection of commerce, and the free flow of commerce.<sup>16</sup>

In 1937, the basic issue of collective bargaining v. restraint on commerce was sharper and more immediately apparent. Mr. Stanley Reed, then Solicitor General, speaking to this Court on behalf of the Board in the lead case on the constitutionality of the Statute, was careful to assure that . . .

“We leave to the employer all the natural rights which he needs to regulate and operate his business.”<sup>17</sup>

In administering the Statute, the 1937 Board thus clearly did not intend to create apprehension in the mind of this Court that commerce would thereby be *further* obstructed. And the decision of this Court confirmed that view:

“The Act does not interfere with the normal exercise of the right of the Employer to select its employees or to discharge them. The Employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right to discharge when that right is exercised for other reasons than such intimidation and coercion.”<sup>18</sup>

Thus, from the very outset, it has been recognized by this Court that the advent of the statute, and the designa-

<sup>16</sup> “It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred . . .” (Sec. 1)

<sup>17</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, appendix @ 759.

<sup>18</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 @ 45.

tion of a collective bargaining representative under that statute, does not of itself interfere with the normal non-discriminatory course of business decision.<sup>19</sup>

**B. Such rights continue until modified by contract.**

Accepting that there *are* employer rights<sup>20</sup>, and that in a non-discriminatory context these rights are not diminished by the Statute, it is an easy corollary that they continue until modified by agreement:

“...the common law right on the part of the employer to select his employees and to terminate their employment at will continues to exist except to the extent that it may be modified by the bargaining contract with the union. Instead of making this right dependent upon a provision to that effect in the contract, it is a right which an employer normally has unless it has been eliminated or modified by the contract.”<sup>21</sup>

The statutory bargaining obligation is thus not the necessary commitment of a company to some form of co-determinism. It does not alter the pre-existent complex of rights except to the extent that agreement to modify those rights is mutually achieved.

<sup>19</sup> It is not our purpose to establish here that any particular decision in a particular situation involves a “management prerogative”, as much as it is to prevent enthronement of an opposite point of view, that which attempts to make *all* unilateral action affecting employees illegal unless there has been prior bargaining.

<sup>20</sup> Obviously, the concept of employer rights *has* real meaning: see, e.g., the definition of “Supervisor” under the Statute as one having power “responsibly to direct” employees. (Sec. 2.(11)) The Board has yet to require prior bargaining about supervisors’ work orders which are at once the quintessence of unilateral decision, yet simultaneously have the most direct effect on employee working conditions. To *owe*ver, if the literal role in Fibreboard II is affirmed, mandatory prior bargaining even in this area would appear only one step away.

<sup>21</sup> *U.S. Steel Corp. v. Nichols*, 229 F. 2d 396 @ 399. See also *Shiels v. B & O Railroad*, 154 F. Supp. 917, and cases there cited.

**C. In the absence of a contractual limitation, accepted collective bargaining practice recognizes that unilateral action is the normal and traditional mode of management operation.**

The common sense of the employer-union relationship is that an employer normally does *not* consult a union about running his business, or before he makes his business decisions. Most business decisions affect employees and their jobs in one way or another. *Fibreboard II*'s directive shocks because it requires *prior* bargaining on such decisions:

The clearest exposition of the rights of management in this respect is a contemporary statement by this very Court:

“Collective Bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. *All these are part of its functions, and absent a collective bargaining agreement, it may be exercised freely* except as limited by public law and the willingness of employees to work under the particular, unilaterally imposed conditions. A Collective Bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages.” (emphasis supplied)<sup>22</sup>

This reassertion of fundamental and traditional legal concepts, largely overlooked in the initial management comment on *Warrior and Gulf* and its companion cases, has been given no consideration by the Labor Board. And only last term, this Court again had occasion to consider the “natural rights”<sup>23</sup> of employers in juxtaposition with union rights, and to state as follows:

“Employees, and the union which represents them, ordinarily do not take part in negotiations leading to

<sup>22</sup>*United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, @ 583.

<sup>23</sup> cf. statement of Solicitor-General Reed, *supra*.

a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that *the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers* be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by the 'relative strength . . . of the contending forces.' *Warrior & Gulf*, supra, at 580."<sup>24</sup> (emphasis supplied).

Thus, deliberate phrasing of this Court's own recent decision, continues to reflect what both legal tradition and the collective bargaining practices of industry have always recognized, diametrically contrary to the concepts of *Fibre-board II*, namely, that there is in collective bargaining a sphere for proper *unilateral* management action.

**D. In issuing a broad and unconditioned prohibition on unilateral management action affecting employees, contrary to common collective bargaining practice in industry, the Board is violating the express instructions of this Court.**

The Labor Board is not free to fashion its mandates in a vacuum, or to impose requirements on collective bargaining that are contrary to common collective bargaining practice in industry. Ruling on an earlier Board holding that would have prevented a company from effectively bargaining for a management rights clause, this Court said:

"Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining

<sup>24</sup> *John Wiley & Sons v. Livingston*, 376 U.S. 543 @ 549.



practice in the industry. *The Board was not empowered so to disrupt collective bargaining practices.* On the contrary, the term 'bargain collectively' as used in the Act 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States'.<sup>25</sup> (emphasis supplied).

This would seem to say in fairly plain terms that a Board result that is contrary to the common collective bargaining practice in the industry and disruptive of such existing practices cannot be sustained. But there is no real question as to what such common existing practice has been. If the two previously cited statements from current decisions of this Court<sup>26</sup> are insufficient to show that a body of traditional unilateral management rights exists, the Labor Board has only to look at its *own* past record, where the following cases make plain what the real tradition has been:

No duty to bargain about plant relocation: see *Brown McLaren Mfg. Co.*, 34 NLRB 984

No duty to consult union before selling, altering, or contracting out: see *Mahoning Mining Co.*, 61 NLRB 792.

"Sec. 8(a)(5) does not require an employer to consult with its employees' representative as a prerequisite to going out of business for nondiscriminatory reasons": see *Walter Holm, & Co.*, 87 NLRB 1169

Against this background, *Fibreboard II*'s unwarranted attempt to prohibit subcontracting without prior bargaining would seem totally disruptive of "common collec-

<sup>25</sup> *NLRB v. American National Insurance Co.*, 343 U.S. 395. @ 408, citing *Telegraphers v. Railway Express Agency*, 321 U.S. 432 @ 346.

<sup>26</sup> See pp. 21-22, *supra*.

tive bargaining practice in industry", and thus invalid under the *American National Insurance* case just cited.

The Board majority in *Fibreboard II* showed itself quite conscious of this defect by blandly asserting in opposition that:

"The present decision does not innovate; it merely recognizes the facts of life created by the customs and practices of employers and unions."<sup>27</sup>

It is difficult, if not impossible, to do justice to the degree of divergence between *this* incredible statement and the actual state of the record as set forth above. To soberly assert such a preposterous claim that *Fibreboard II* merely codifies everyday practice shows almost the mark of an Orwell. Even the one case cited by the Board in support proves the opposite claim.<sup>28</sup>

**E. This Court has already recognized and distinguished between legitimate and illegal unilateral subcontracting.**

The stated position of the Labor Board in this case is that this Court has already decided the underlying question. In directing prior bargaining about decisions to subcontract, the Board protests that its hands are tied, that it is merely carrying out this Court's mandate:

"We do not, however, believe that the issue presented is one within the Board's discretion. In our opinion, the question is foreclosed by the Supreme Court's decision in the *Telegraphers* and other cases."<sup>29</sup>

<sup>27</sup> 138 NLRB 550 @ 554.

<sup>28</sup> 138 NLRB 550 @ 554, footnote 17, citing *UAW Local 391 v. Webster Electric Co.*, 299 F. 2d 195. The holding in Webster relied on the contract to support a limitation on subcontracting, thus demonstrating that in the absence of a contract no such limitation could be presumed. This is hardly the fulcrum by which to reverse an entire tradition which the Board has been directed to respect.

<sup>29</sup> *Fibreboard II*, 138 NLRB 550 @ 552, citing *Order of Railroad Telegraphers v. Chicago & Northwestern Railway Co.*, 362 U.S. 330.

The point has already and adequately been made elsewhere that *Telegraphers* is a citation wholly out of context. *Telegraphers* was an employer action for an injunction, to prevent a strike over a union demand that no jobs be abolished except by mutual agreement. The decision there was that such a union demand was *not illegal* (thereby preserving Norris-LaGuardia protection to the union).

But such a ruling in no way establishes or even suggests that management *must take the bargaining initiative* and even in the absence of the contract provision sought by the union, nevertheless consult with the union before taking action; if anything, the whole set of facts in *Telegraphers* proves again that unless there was acceptance of the union demand, the company remained free to continue unilaterally—hence the union threat of strike action. Failure of the Board to point out these key factors is not to inspire confidence in its citations.

It is true, of course, that the Board did not have available at the time of *Fibreboard II* the recent decision of this Court in *Erie Resistor*.<sup>30</sup> Here, the difference between proper and improper subcontracting, and the distinction created by a discriminatory context has been specifically pointed out:

“Though the intent necessary for an unfair labor practice may be shown in different ways, proving it in one manner may have far different weight and far different consequences than in proving it in another. When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices . . . Compare *Labor Board v. Brown-Dunkin Co.*, 287 F. 2d 17, with *Labor Board v. Houston Chronicle Publishing Co.*, 211 F. 2d 848 (subcontracting union work); and *Fiss Corp.*, 43

<sup>30</sup> *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

NLRB 125, with *Jacob N. Klotz*, 13 NLRB 746 (movement of plant to another town).'<sup>31</sup>

*Brown-Dunkin* involved employer reprisal for union activity. The company was accordingly directed to bargain over the subcontracting of maintenance work. In *Houston Chronicle*, the company unilaterally changed to an independent contractor system of newspaper distribution, refusing to bargain with respect to the former employees (cf. *Fibreboard*). The decision, cited with approval by this Court above, upheld *Houston Chronicle's* refusal—a direct contradiction of *Fibreboard II*.

We again have an illustration of how far the Board has departed from traditional and accepted concepts of bargaining. The cited passage from *Erie Resistor*, above, is clear testimony as to what was still considered the traditional point of view by the business community and this Court many months after the Board's decision in *Fibreboard II*.

**F. Request as an essential element in the duty to bargain.**

In *Fibreboard II*, the Board found a violation of Section 8(a)(5) at the point where the Company unilaterally decided to subcontract. In other words, when an employer, having made up his mind to subcontract, notifies the union in order to extend an opportunity to bargain about the effects of the decision, the illegal act is already complete; that employer has already violated the law.

To achieve this Draconian twist, the Board has had to pass over in silence the whole problem of prior request, although only a few months before *Fibreboard II* it had confirmed that

“It is well settled that a violation of Section 8(a)(5) cannot be found unless there is an appropriate request to bargain”<sup>32</sup>

<sup>31</sup> 373 U.S. 221 @ 227.

<sup>32</sup> *Lori-Ann of Miami, Inc.*, 137 NLRB 1009 @ 1113.

As recently as two years ago, this Court, in finding unilateral action by an employer illegal, was also careful to include as conditions of such a finding that:

1. The subject matter must be a subject for mandatory bargaining under Section 8(d).

2. The subject matter must be under current negotiation or a subject about which the union seeks to negotiate.

"A refusal to negotiate in fact as to any subject which is within Section 8(d), *and about which the union seeks to negotiate*, violates Section 8(a)(5) . . . We hold that an employer's unilateral change in conditions of employment *under negotiation* is similarly a violation of Section 8(a)(5) . . ."<sup>33</sup> (emphasis supplied)

Even in the *Timken* case—the case relied on by NLRB to date its subcontracting rule back to 1946,<sup>34</sup> prior request by the union to bargain on subcontracting was a critical element. The finding of the *Timken* Trial Examiner, as approved by the Board, is quite specific:

"The subcontracting of work was done pursuant to a policy adopted by the respondent prior to the advent of the bargaining representative. Hence there is no question of unilateral action taken without consultation with the union in the first instance. *The failure*

<sup>33</sup> *NLRB v. Katz*, 369 U.S. 736 @ 743. See also *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 @ 297: "However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining . . ."

<sup>34</sup> Ignoring the wealth of contrary Board cases which established that in the absence of discriminatory considerations, there was no obligation to bargain about contracting out work, or about the closing or removal of a plant: e.g., *Brown-McLaren Mfg. Co.*, 34 NLRB 984; *Mahoning Mining Co.*, 61 NLRB 792 @ 803; *Walter Holm & Co.*, 87 NLRB 1169. Cf. citation from *Erie Resistor*, supra.

to bargain dates from Oct. 15, 1945 when the respondent replied to the union's letter of Oct. 11 on this subject."<sup>35</sup> (emphasis supplied)

Consequently, it must be assumed that if a specific demand from the union had *not* arisen in *Timken*, continued subcontracting by the company would be completely permissible, untainted with Section 8(a)(5) illegality, even though it was known that the amount of subcontracting then being done represented the work of 200 men.

**G. Labor Board objectives underlying *Fibreboard II* may not have statutory sanction under the National Labor Relations Act.**

Some frank discussion of underlying motivation can aid considerably in the analysis of *Fibreboard II*.

The reasons for management's attitude are obvious. Management simply sees no practical way to comply with *Fibreboard II* effectively. All management decisions have some unit impact; the most subjective and uncertain decisions, such as whether to anticipate public taste by a switch in product lines that calls for a new and different workforce,<sup>36</sup> may have the greatest impact. To comply with *Fibreboard II*, management must, on its own initiative, consult with the union beforehand whenever potential impact is involved. The alternative is to risk a directive—perhaps years later—restoring an outmoded status quo.

The mischief let loose by such unreal requirements, applied to the complex daily volume of electronic "make-or-

<sup>35</sup> *Timken-Roller Bearing Co.*, 70 NLRB 500 @ 518, footnote 19.

<sup>36</sup> The practical impossibility of justifying such changes to a union of employees who will lose their jobs is apparent. The employer must get out of the old product line while the market is still good, and supplies and machinery are readily disposable; he cannot plead any present economic justification whatever. Nor may he, for competitive reasons, disclose the *persuasive details* of any new activity. Yet these are precisely the classical entrepreneur decisions, the most necessary of all decisions for a flourishing competitive economy.



buy", is incalculable. Nor is the effect on everyday business practice in any industrial firm less devastating.<sup>37</sup>

Labor Board motivations, on the other hand, are not entirely clear. But from references by Board members in the published decisions, the outlines of several underlying objectives not sanctioned by the statute, are discernible. These include protection of the representation status of a particular union as an end in itself, social desirability,<sup>38</sup> and ease of administration.<sup>39</sup>

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<sup>37</sup> How the pace of business decision—which is the pace of turnover, the pace of commerce itself—can be maintained in this context is hard to conceive. The ability to risk, to ride with a turn in the market, to cut prospective losses, is bound up with the ability to act instantly and decisively. Nor are such decisions normally intellectual exercises, as much as they are instinctive trained reactions, sharpened by the success or failure of past decisions. Most are not susceptible to justification in any documented sense. The sheer weight of having to justify such action cannot but help frustrate more volatile risk taking in an organized industry. Such an effect is no service to commerce, to the pace of commerce, or to the national economy.

<sup>38</sup> Cf.: "Business operations may profitably continue and jobs may be preserved" (*Town & Country*, supra @ 1027).

<sup>39</sup> The Labor Board's task in attempting to prove a discriminatory loss of employment under Section 8(a)(3) in a subcontracting case can often require a considerable degree of effort. This is particularly true where the subcontracting situation also involves an economic motivation. However, the adoption of the rule in *Fibreboard II* has reduced the need for such proof in many cases. Subcontracting decisions made with discriminatory motivation are not likely to have been topics of prior discussion with the union. Under *Fibreboard II*, the remedy for such failure to discuss (as a refusal to bargain) is now reinstatement with back pay. Thus, under *Fibreboard II*, the same remedy is now available to the Board on a much simpler fact situation and without proving motive, as could have been obtained (with much more work and much less certainty of outcome) under a discrimination proceeding based on Section 8(a)(3).

Some segment of the Board obviously views the power to subcontract as the power to destroy. Cf. Member Fanning's dissent in the first *Fibreboard* case:

"as a result of the majority's decision, employers by the simple expedient of unilaterally subcontracting work may abolish every job in a collective bargaining unit and thereby eliminate union representation".<sup>40</sup>

We submit that such dire predictions are both inapposite and misleading. The elimination of unit jobs is not of itself "good" or "bad", either in conscience, or under the National Labor Relations Act. Some jobs in present society should be eliminated as rapidly as technology permits, while preservation of jobs at one firm may well be a deprivation of work elsewhere.

Patterns of employment distribution are not the concern of the Labor Board; what properly matters to the Labor Board is *motive*. If the motive for eliminating unit jobs is anti-union or discriminatory, the statute already provides ample traditional remedy. But if such elimination is economic, and not discriminatory, then it is *not* a violation of the National Labor Relations Act and the Board has *no* power to regulate such management action.

Moreover, protection of the representative status of any particular union is not an end in itself, and the Labor Board has no power to confer such protection to the exclusion of other rights and interests. Collective bargaining is the servant of commerce, not its master. Far from granting absolute protection to union status, the National Labor Relations Act itself contains procedures for terminating such status in the interest of industrial stability. An existing union may thus have such status legally taken away, in which case the election of any union is prevented for at least a year.<sup>41</sup>

<sup>40</sup> *Fibreboard I*, 130 NLRB 1558 @ 1564.

<sup>41</sup> Sec. 9 (c) (1) (A) (ii); Sec. 9. (c) (3).

Thus, such motives as preventing the elimination of union representation or unit jobs cannot in themselves become the business of the Labor Board, because they have not been made the business of the statute by Congress.

**II. WITH FIBREBOARD II, THE BOARD IS SERIOUSLY MEDDLING WITH ESTABLISHED BARGAINING RELATIONSHIPS, AND HAS ENTERED UPON REGULATION OF THE SUBSTANTIVE PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS IN DIRECT VIOLATION OF THE MANDATES OF CONGRESS AND OF THIS COURT.**

Although "absent a collective bargaining agreement", management functions may be "exercised freely"; the fact is that under "the philosophy of bargaining as worked out in the labor movement in the United States,"<sup>42</sup> many labor agreements do refer to subcontracting, and in many others, silence on subcontracting is a very real part of the bargain.

It is not unusual for negotiations to open with a union demand for advance notice of future subcontracts<sup>43</sup>—later withdrawn in return for a more favorable wage rate. Or, some notice may be agreed to at a sacrifice in wage increases. The understanding achieved may be written or informal, and may or may not involve subcontracting arbitrability.

<sup>42</sup> Cf. references at footnote 22 and 25, *supra*.

<sup>43</sup> It always having been understood, until *Fibreboard II*, that a union's subcontracting rights, if any, depended the understanding reached between the parties. Cf. Derber, Chalmers, and Edelman, "Union Participation in Plant Decision Making", *Industrial and Labor Relations Review*, Cornell U., October 1961, pp. 83-101, @ 90: " . . . the Board has also refrained from determining at which point in the administrative process management must discuss a decision with the union. Hence the parties are free to decide for themselves whether management can act subject only to the union right to file a grievance after the action, whether it must give advance notice before proceeding, whether it must consult with the union before acting although not necessarily reaching an agreement, or whether it must withhold action until an agreement has been reached." (emphasis supplied)

Whatever the case, the fact remains that at one stroke, the Board now appears to have given some unions the very demand which they had willingly withdrawn for a price, and to have conferred upon others the very concessions which they had already sacrificed to obtain.

It would be fatuous to suggest that the Board, in equity, should now send these parties back to the bargaining table to undo the prices paid for the concessions now granted so freely by the Board. In the practical order it would be more in point to redirect the Board's attention to Section 8(d) of the Act, and to this Court's clear exposition of that section's requirements:

"Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining."<sup>44</sup>

### **III. NLRB POLICY OF SETTING FORTH RULES OF GENERAL APPLICABILITY THROUGH DICTA IN SPECIFIC CASES HAS CONTRIBUTED TO THE DIFFICULTIES IN FIBREBOARD II.**

In fashioning collective bargaining rules for the guidance of employers and unions, the National Labor Relations Board has chosen to announce such regulations through rule of decision in individual cases. The Board's rule-making authority under Section 6 of the National Labor Relations Act, and under Section 4 of the Administrative

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<sup>44</sup> *NLRB v. American National Insurance Co.*, 343 U.S. 395 @ 409.

Procedure Act<sup>45</sup> has been confined entirely to procedure before the Board.

The Administrative Procedure Act requires, in general, that notice of a proposed rule shall first be published in the Federal Register, and that interested persons then be given adequate opportunity to "*participate*" in such rule making through submission of written data, views, or arguments. Moreover, rules so adopted do not normally become effective for at least 30 days after final publication, providing due notice and opportunity to comply.

These salutary provisions at once insure thorough consideration and fair play application. The Agency will have the full benefit of opinion and discussion from all parties affected, and not merely the parties to the particular case selected as publication vehicle.<sup>46</sup> At the same time, they avoid the unfortunate connotation of *ex post facto* action which adheres to direct reversals, with penalty, of prior authoritative Board pronouncements. The unfortunate party in such case has neither notice nor opportunity to correct, and may have to pay a heavy price for

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<sup>45</sup> Title 5, U.S.C., § 1001 et seq.

<sup>46</sup> Cf. the manner in which NLRB first announced reversal of Fibreboard I, and promulgated the new rule that bargaining was now required before deciding to subcontract. *Town and Country* was found to involve subcontracting to avoid union representation (136 NLRB 1022 @ 1026). The Fifth Circuit enforced on the basis of such discrimination (316 F. 2d 846). Yet in *Fibreboard II*, *Town and Country* is cited as the authority for mandatory bargaining even in the absence of discrimination. This is a clear instance of "the *sub rosa* formulation of rules in the guise of ad hoc decisions" which furnishes "eloquent testimony to the necessity of utilizing rule making powers for effective discharge of the Board's obligations" (see Peck, "The Atrophied Rule Making Powers of the National Labor Relations Board," 70 Yale Law Review 729 @ 753).

his lack of ability to discern which current Board doctrines cannot safely be relied on.

The instant *Fibreboard* case is a clear example. Lacking the benefit of public hearings and discussion as provided by the Administrative Procedure Act the Board has not only failed to define its subject matter adequately, but in fact has unwittingly fashioned a remedy far larger than the actual problem.

Even terminology becomes confused. The case under review at Intermediate Report and Board level is almost exclusively concerned with "subcontracting". In the Solicitor-General's brief to this Court re certiorari, "contracting out" is the only term. The Board is equally imprecise in indicating whether the problem to be controlled is unilateral removal of work from the unit by any means (as other current Board cases indicate) or whether the means of removal (subcontracting, sale or change in process) are equally important.

If the Board had been permitted to study the problems raised by its proposed rules in their total perspective, it might well have found that for its objectives there were adequate statutory remedies available within the framework of existing law and the traditional and recognized concepts of collective bargaining embodied in that law.<sup>47</sup>

The Board would also have been helped to avoid the perennial administrative temptation to regulate through touchstone "per se" criteria, more than once struck down by this Court.<sup>48</sup>

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<sup>47</sup> Cf. Resolution of the House of Delegates, American Bar Association, calling upon NLRB "to comply in the future with the rule making provisions of the Administrative Procedure Act in the area of contract bar as well as all other appropriate areas" (February 17, 1964).

<sup>48</sup> Cf. *American National Insurance Company*, 343 U.S. 395, reversing NLRB's rule that insistence upon any management rights clause was *per se* bad faith bargaining.



#### IV. THE DEFENSE PRODUCTION REQUIREMENTS APPROVED BY CONGRESS ARE INCOMPATIBLE WITH FIBREBOARD II.

##### A. Congressional policy on mandatory subcontracting.

The Report of the Selected Committee on Small Business, House of Representatives, issued on December 17, 1962, summarized basic Congressional intent succinctly:

As military and weapons and equipment become more complex and sophisticated, and weapon systems procurement constitutes an ever-increasing share of military procurement; it becomes more and more difficult for small business to obtain a fair share of Government procurement. The tendency to award contracts for complete systems, rather than component parts, diminishes opportunities for small business participation as prime contractors.

To meet this situation, Public Law 87-305 was enacted. This law provides that prime contracts in excess of \$1 million, and subcontracts in excess of \$500,000, *must* include provisions requiring prime contractors and subcontractors to conform to the small business subcontracting program. The purpose of this act is to assure greater small business participation at the subcontracting level.

To implement this act, the Small Business Administration, the Department of Defense, and the General Services Administration, developed a small business subcontracting program applicable to all contracts in excess of \$500,000. This subcontracting program has been incorporated into the Armed Services Procurement Regulations and the Federal Procurement Regulations.

The act *requires* that "small business concerns be considered fairly as subcontractors and suppliers to contractors performing work or rendering service as prime contractors or subcontractors under Government procurement contracts."

The new program insures that a prime contractor's decision to make or buy a component will not operate to the detriment of competent small business suppliers; that the Small Business Administration shall be af-

forded an opportunity to comment and make recommendations on make-or-buy programs which would reduce anticipated small business participation; that extensive subcontracting be given consideration in evaluating bids or selecting contractors for negotiated contracts; that the Small Business Administration be afforded the opportunity to study contractors' subcontracting practices and procedures; and that non-compliance with the requirements of the program may result in a termination for default of the prime contractor's contract. (Report, p. 12) (emphasis supplied)

Four quotations from Public Law 87-305 further illustrate the intent of Congress with respect to subcontracting:

*First*, the program is mandatory:

"Every contract for services (including but not limited to contracts for research and development, maintenance, repair and construction, but excluding contracts to be performed entirely outside the United States or its territories) in excess of \$1,000,000 made by a Government department or agency, which in the opinion of the procuring agency offers substantial subcontracting possibilities, shall require the contractor to conform to the small business subcontracting program promulgated under this subsection, and to insert in all subcontracts and purchase orders in excess of \$500,000 which offer substantial possibilities for further subcontracting a provision requiring the subcontractor or supplier to conform to such small business subcontracting program." (P.L. 87-305, 15 USC 637 (d) (2))

*Second*, a contractor's prospect of future business may depend upon effective and wholehearted compliance:

"... such program shall provide that in evaluating bids or selecting contractors for negotiated contracts, the extensive use of subcontractors by a proposed contractor shall be considered a favorable factor . . ." (Sec. (d) (1))

*Thirdly*, however, the intent of Congress is that despite the overall objective of increased small business opportunity, the discretion of any prime contractor to award or withhold *any specific contract* is to remain completely unfettered:

“... such program shall not authorize the Administration to:

“(i) prescribe the extent to which any contractor or subcontractor shall subcontract,

“(ii) specify the business concerns to which subcontractors shall be granted, or

“(iii) vest in the Administration authority respecting the administration of individual prime contracts or subcontracts . . .” (Sec (d) (1))

And *finally*, the confidential and proprietary rights of each contractor are protected:

“Nothing in this subsection shall be construed to authorize the Administrator, the Secretary of Defense, or the Administrator of General Services to secure and disseminate technical data or processes developed by any business concern at its own expense.” (Sec(d)(4))

**B. The applicable procurement regulations which effectuate this Congressional intent require maximum subcontracting effort from Government prime contractors.**

**1. “Make-or-Buy” Limitations.**

A prime contractor is not at liberty to manufacture components or to supply services for the completion of his own contract when such components or services are outside his own line of business, even where he is in a position to supply such components or services without extra cost. The Armed Services Procurement Regulations (ASPR) provide, in Section 3-902.1(a), with respect to “make” portions of the contract—those which the prime contractor seeks to retain for himself:

“(g) Proposed ‘make’ items shall not be agreed to when the products or services under consideration—

“(i) are not regularly manufactured or provided by the contractor, and in the opinion of the contracting officer are available—quality, quantity, delivery, and other essential factors considered—from other firms at prices no higher than if the contractor should make or provide the product or service; or

“(ii) are regularly manufactured or provided by the contractor, and are available—quality, quantity, delivery, and other essential factors considered—from other firms at prices lower than if the contractor should make or provide the product or services;

“*provided*, that such items may be agreed to, notwithstanding (i) and (ii) if in the opinion of the contracting officer the overall cost of the contract to the Government would be increased if the item were ‘bought.’ ”

## **2. Small Business Considerations.**

A prime contractor with the Department of Defense or its subsidiary agencies has an affirmative obligation to subcontract the maximum available to small business concerns. ASPR 1-707.2 and 3 set forth the basic requirements:

“1-707.2 Small Business Subcontracting Program. The Government’s small business subcontracting program requires Government prime contractors to assume an affirmative obligation with respect to subcontracting with small business concerns. In contracts which range from \$5,000 to \$500,000, the contractor undertakes the obligation of accomplishing the maximum amount of small business subcontracting which is consistent with the efficient performance of the contract. This undertaking is set forth in the contract clause prescribed in 1-707.3(a). In contracts which may exceed \$500,000 the contractor is required, pursuant to the clause set forth in 1-707.3(b) to undertake a number of specific responsibilities designed to assure that small business concerns are considered fairly in the subcontracting role and to impose similar responsibilities on major subcontractors. (The liaison officer required by the latter clause may also serve as liaison officer for labor surplus area matters.)

### **"1-707.3 Required Clauses.**

(a) The "Utilization of Small Business Concerns" clause below shall be included in all contracts in amounts which may exceed \$5,000 except (i) contracts which, including all subcontracts thereunder, are to be performed entirely outside the United States, its possessions, and Puerto Rico; and (ii) contracts for services which are personal in nature:

"Utilization of small business concerns (Jan. 1958)

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract."

### **3. Labor Surplus Area Program.**

A "labor surplus" area is a geographic area classified by the Department of Labor as an "area of substantial labor surplus" or as an "area of substantial and persistent labor surplus," depending upon the degree of unemployment that has occurred over a given period of time. The procurement regulations require prime contractors to take such designations into account, and channel subcontract work accordingly.

### **4. "Cost Reduction" Considerations.**

Department of Defense efforts to obtain maximum value received for its purchasing dollar are currently designated as the Department's "Cost Reduction Program". As described by the agency, this forms another officially-sponsored subcontracting inducement:

"The efforts to increase the number and value of fixed-price type contracts and to improve competition at prime contract level clearly have a bearing on the sub-

contract program. Contracts which are awarded after free and open competition with the price fixed by the bidding procedure encourage bidders to seek the most qualified subcontractors and vendors whose prices are most favorable without distinguishing between large and small.<sup>49</sup>

For a summary of the effect of Government policies upon the Defense program, see the table of payments to defense prime contractors, and the amounts paid out in turn to subcontractors, in the Appendix. This table shows that nearly half the defense dollar is ultimately subcontracted, and that around one third of the subcontracted dollars goes to small business firms.

**C. Fibreboard II puts major Defense suppliers into areas of conflict that Congress could not have intended.**

A major defense supplier, faced with need to conform to the literal mandate of *Fibreboard II*, must now resolve for himself these problems:

1. In preparing a bid, shall he consult with the union about the portions of the job he will subcontract pursuant to ASPR, *before* he gets the order? (This is the point at which effective decisions affecting unit jobs are made.)
2. A single order may involve placement with small business of several thousand separate and individual subcontracts. Each represents work which, by itself, could have been handled in the prime contractor's plants, and so given more employment security to bargaining unit members. Must each such order now be the subject of consultation before placement, at the risk of a directive from NLRB restoring *status quo* if discussion is cut off too soon? Must the employer take the initiative with respect to such consultation, or risk the same penalty?

<sup>49</sup> (Report: "The Defense Small Business Subcontracting Program", Office of the Assistant Secretary of Defense)



3. Would not the *power* to consult about such individual subcontracts itself become a new trading tool, to be applied or withheld by a union in return for other concessions, thus seriously dislocating the present balance of bargaining power?
4. How can conflicting requirements to retain maximum work for a bargaining unit be reconciled with ASPR requirements of maximum subcontracting? Unless there is a *significant* price differential in favor of the small business subcontractor, the employer has no real bargaining power to support the average individual decision to subcontract per ASPR requirements. ASPR and its underlying statute *presuppose* and protect employer discretion (15 USC 637, proviso to (d) (1)) with respect to such individual decisions; the net result can only be *less* subcontracting to small business, despite the clearest expression of opposite Congressional intent.

Obviously, the rule in *Fibreboard II* was framed without the benefit of any consideration or discussion on problems like these. Such problems will, if nothing else, change the entire *pace* at which business decisions are made, with an impact on commerce as adverse as any that the Statute was enacted to prevent. When there is added to this some consideration for the enormous volume and complexity of electronics procurements and make-or-buy decision making, as previously described—none of which was taken into account when the *Fibreboard II* rule was framed by the Board—the concern of the Electronics Industry becomes even more justified and apparent.

### SUMMARY AND CONCLUSION

The Electronic Industries Association respectfully submits to this Court that the rule in *Fibreboard II*—

—is contrary to established law, in that it denies to employers those normal and traditional rights to unilateral

decision, hitherto clearly acknowledged by the Congress, the Board, and this Court;

—is in direct conflict with the defense procurement policies established by Congress;

—constitutes an interference with collective bargaining which, contrary to the command of Congress and this Court, injects the Board into the substance of bargaining and seriously meddles with an established balance of power;

—finally, demands clairvoyance by every employer to discern what change in Board rules tomorrow will penalize him for yesterday's actions.

The Electronic Industries Association therefore respectfully urges that the judgment of the Court of Appeals herein be vacated and the case remanded with direction to enter judgment setting aside the Board's order.

Respectfully submitted,

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August 25, 1964

# APPENDIX

## DEFENSE SUBCONTRACTING BY FISCAL YEAR, 1957 THROUGH 1963

Dollar Amounts in Millions	1957	1958	1959	1960	1961	1962	1963
1. Number of Large Contractors Reporting Their Subcontract Receipts and Payments to Department of Defense	298	294	298	298	309	378	453
2. To Small Business Concerns	\$ 3,562	\$ 3,242	\$ 3,336	\$ 3,587	\$ 3,495	\$ 4,011	\$ 4,341
3. To Other Business Concerns	5,752	5,784	5,808	6,079	5,912	6,549	7,070
4. Total Subcontract Payments	\$ 9,314	\$ 9,026	\$ 9,144	\$ 9,666	\$ 9,407	\$10,560	\$11,411
5. Military Contract Receipts by Reporting Contractors from Prime and Subcontract Work	\$16,992	\$17,479	\$18,704	\$19,095	\$19,803	\$22,337	\$23,667
6. Percent of Receipts Paid Out to Subcontractors (Line 4 ÷ Line 6)	54.8%	51.6%	48.9%	50.6%	47.5%	47.3%	48.2%

SOURCE: Report: "Military Prime Contract Awards and Subcontract Payments, July-December 1963", Office of the Secretary of Defense, Table 19, p. 49.

Office-Supreme Court, U.S.

FILED

AUG 27 1964

JOHN F. DAVIS, CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1964

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FIBREBOARD PAPER PRODUCTS CORPORATION,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL

On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia

BRIEF FOR THE CHAMBER OF COMMERCE OF THE  
UNITED STATES AS AMICUS CURIAE

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1964

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No. 610

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FIBREBOARD PAPER PRODUCTS CORPORATION,  
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, ET AL

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On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE  
UNITED STATES AS AMICUS CURIAE

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I. INTRODUCTION

The Chamber of Commerce submits this brief as amicus curiae because of the concern of its membership in this matter. Permission to file a brief was granted by the parties pursuant to Rule 42(2) of the Rules of the Supreme Court.

The Chamber of Commerce of the United States is a federation, consisting of a membership of over 3,900 na-



tional, local and state chambers of commerce and trade associations, with an underlying membership of approximately 1,700,000 business firms and a direct membership in excess of 19,400 business firms. Many members are engaged in interstate commerce or in activities which affect interstate commerce and are, therefore, subject to federal laws that affect the employer-employee relationship.

## II. STATEMENT OF THE CASE

This case arose out of a decision by the National Labor Relations Board (referred to herein as "the Board") which had sustained a complaint alleging that the Petitioner (referred to herein as "the Employer") had refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act (referred to herein as "the Act")<sup>1</sup>

Stated briefly, the alleged violation occurred when the Employer decided during the normal conduct of his business that he could save over \$200,000 a year by having another company perform his maintenance work. When Local 1304 of the United Steelworkers, the bargaining representative of the maintenance employees, was notified of this decision, it filed a charge of a refusal to bargain against the Employer. A complaint was then issued by the Board's General Counsel alleging a violation of Section 8(a)(5) on the ground that the Employer had not bargained with the Steelworkers concerning his decision to contract out the maintenance work. The Trial Examiner which heard the case recommended to the Board that the complaint be dismissed because the Employer's decision was not discriminatorily motivated. The Board, with one member dissenting, adopted the Trial Examiner's

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<sup>1</sup> The relevant provisions of the Act concerning the duty to bargain are contained in the Appendix.

recommendation and dismissed the complaint. *Fibreboard Paper Products Corporation*, 130 NLRB 1558 (1961).

Subsequently, after two new members were appointed, the Board reconsidered its decision, reversed itself, and, with one member dissenting, found that the Employer's failure to negotiate with the union concerning his decision to contract out the maintenance work constituted a violation of Section 8(a) (5) of the Act.

To remedy the alleged violation, the Board ordered the Employer to abrogate its agreement to contract out work, reinstitute the maintenance operation, reinstate the employees with back pay, and bargain with the union before making any changes with respect to contracting out. *Fibreboard Paper Products Corporation*, 138 NLRB 550 (1962).

The Court of Appeals for the District of Columbia affirmed the Board on the ground that contracting out is a required subject for bargaining. *Fibreboard Paper Products Corporation v. NLRB*, 322 F. 2d 411 (C.A. D.C.).

### III. ARGUMENT

#### **Fibreboard Doctrine Will Drastically Affect Future Management-Labor Relationships**

The ultimate effect of the *Fibreboard* decision and the trend of Board decisions, is to make almost any intended operational change by an employer a required subject for bargaining and co-determination with the union.

Indeed, the Board has already required bargaining about business expansion, automation, discontinuance of business, selling a business and transferring work from one plant to another.<sup>2</sup>

<sup>2</sup> See: *W. L. Rives Company*, 136 NLRB 1050 (1962); *Renton News Record*, 136 NLRB 1294 (1962); *Star Baby*

If this Court sustains the Board's decision in the *Fibreboard* case, the results of this new doctrine can lead to greater industrial strife than has been experienced since the close of World War II.

It would also mean that an employer is not only strictly limited with respect to contracting out, but he also cannot make any change or decision concerning his business without first obtaining the union's consent. Thus, an employer's freedom to operate is impaired irrespective of the reason or need for the change, or the loss which may be incurred because of delay in putting the change into effect.

A number of hypothetical cases are worthy of consideration.

*Hypothetical Case No. 1:* Let us suppose a company has an opportunity to buy a new and better machine. Decisions to do so are being made daily by employers throughout the country. These decisions have been made unilaterally by management throughout the history of our

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*Company*, 140 NLRB No. 67 (1963); *Weingarten Food Center of Tenn., Inc.*, 140 NLRB No. 25 (1962).

One of the Board's trial examiner's has justified these Board's decisions on the ground that the relationship between an employer and a union "is like a marriage."

"But we can well imagine the almost universal cry in every home in the land should the husband, without first talking it over with his wife, rent out the spare room in the home to a lovely young roomer, be she blonde, brunet or red head! The same thing is true, with perhaps a difference in degree, should the husband just sell his wife's beloved fur coat! These things just cannot be done if the marriage is to be kept going. The public interest in labor-management relations is to keep the parties together." *Jersey Farm Milk Service, Inc.*, TXD-520-63, dated November 15, 1963.

country. This includes the time that has elapsed since the Wagner Act was enacted.

Buying and installing a machine is not "wages, hours, or other terms and conditions of employment."<sup>3</sup> Literally the Act does not provide that the employer must bargain about it.

But suppose that buying the machine will create a situation in which the employer will be able to reduce his labor force from 50 to 35 employees. Without doubt, this reduction in force affects the employees' "conditions of employment." According to the Board, the employer is obligated to bargain. The bargaining may relate to whether the machine will be purchased in the first place; whether the new machine is to be operated by 50 employees or by 35; how many hours a week they will work; whether the hourly rate will be adjusted to maintain weekly earnings; whether there will be severance pay if the number of employees is reduced; and the allocation of available jobs and job classifications among the employees.

In short, it is the Board's view that the decision to purchase a new machine is to be a joint decision, arrived at by the company and the union through collective bargaining.

*Hypothetical Case No. 2:* But let us now suppose that the employer's decision is not whether to buy a modern machine as a replacement, but is a decision as to the design of next year's product model.

For example, a manufacturer of home appliances decides to eliminate bright molding used in his last year's models. Most of his employees are within a bargaining unit represented by one union, but those who polish the molding are within a bargaining unit represented by a second union. Thus, if the molding is eliminated the em-

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<sup>3</sup> See the Appendix concerning the duty to bargain.

ployer will have no more molding to be polished, all of his metal polishers will be terminated, the bargaining unit will disappear, and so will his relationship with the second union.

Did the employer commit an unfair labor practice by failing to bargain with the union about the decision to eliminate bright work from his new model? Is it the law that the design of next year's model, if it may create a situation which will affect working conditions, is a decision to be made jointly by the company and the union through collective bargaining?

*Hypothetical Case No. 3:* Let us suppose a company is engaged in manufacturing parts for experimental aircraft and production parts for conventional aircraft. The company finds that its orders for the experimental parts are unprofitable; but that its orders for production parts are very profitable. The shift in the product mix to more production parts requires some shift in the proportions of skills required in the plant and may lead to downgrading or layoff of some skilled men and perhaps employment of others of lesser skills. Arguably, the company must bargain about the downgrading and the layoffs. Indeed, his collective bargaining agreement probably embodies the results of such bargaining. But, will the Board rule that the decision whether to reject the unprofitable order and to seek and accept the additional orders for production parts, must be a joint decision by the company and the union, with the results embodied in a collective bargaining agreement?

*Hypothetical Case No. 4:* Let us suppose that a company engaged in making electronic components has an extensive research and development program which costs a great amount of money. The management concludes, as a matter of business judgment, that by curtailing its research and development program, and relying upon the

inventions of others, it can better promote the growth and prosperity of the company.

Will the Board rule that the decision to curtail the research and development program must be made jointly by the company and the union through collective bargaining with the results embodied in an agreement?

*Hypothetical Case No. 5:* Let us suppose the same electronic components manufacturer has the same research and development department. The director of that department dies and a new director must be selected.

A great deal turns upon the outcome of the selection of a new director. If a poor selection is made, new developments and inventions may not be forthcoming; the company's competitive position may be affected; orders may drop off; and fewer employees may be needed. The company has two candidates for the job, Doctor X and Doctor Y. Is the decision whether to appoint Doctor X or appoint Doctor Y to be made jointly by the company and the union through collective bargaining? And if the company simply appoints Doctor X unilaterally, without first notifying the union and bargaining with it, has it violated § 8(a) (5) of the Act?

These five hypothetical cases may seem farfetched. But are these cases beyond the realm of possibility? Certainly the hypothetical case of buying a new machine is not. That is the Board's decision in *Renton News Record*.<sup>4</sup> Certainly the hypothetical case of turning down the unprofitable order is not. That is a trial examiner's decision in the *William J. Burns International Detective Agency*.<sup>5</sup> Certainly the hypothetical does not go beyond the trial examiner's decision that Shell Oil Company must bargain

<sup>4</sup> *Renton News Record*, 136 NLRB 1294 (1962).

<sup>5</sup> TXD 188-64; DLR No. 78 April 21, 1964.



with the union about whether it transports gasoline to Lansing through Grand Haven rather than through Detroit.<sup>6</sup>

The fundamental error of the Board's ruling is its misconception of the duty to bargain. It believes that an employer must bargain about any managerial decision which affects his employees. Since every business decision affects conditions of employment in some manner, the logical reach of the Board's decision is to make virtually every managerial decision a required subject for bargaining.

The Act, on the other hand, provides that the employer must bargain only with respect to wages, hours, and other terms and conditions of employment. Neither the statute nor Congressional debates indicate that employers must bargain with respect to every business decision which may affect conditions of employment.

The members of the Board, however, are not persuaded by the Act and Congressional debates. The new majority of the Board apparently believe that they have an electoral mandate to change the economic structure of the country so that every business decision is made by a joint company-union committee. We respectfully submit that the Board has received no such mandate either from Congress or from the election returns.

#### **It Is Not Within the Board's Province to Solve the Problems Created by Technological Progress**

The major premise of the Board's reasoning does not appear in the *Fibreboard* decision.<sup>7</sup> Nevertheless, the be-

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<sup>6</sup> *Shell Oil Company*, TXD 199-64; DLR No. 76, April 17, 1964.

<sup>7</sup> When an agency fails to disclose the grounds for its decision, the parties and courts must glean unofficial sources in order to determine the basis for the agency's action. Such

lief that restrictions on an employer's business judgment may alleviate the problems associated with automation or technological progress appears to be an important consideration for the new majority of the members of the Board.

The Chairman of the Board, *Frank McCulloch*, is most candid by stating:

"Automation has forced a change in thinking—in fact, that is what automation really is—a rethinking of industrial process . . . In its small way the Board is attempting, *under the mandate of Congress*, to help management and labor to join together to solve this, the most basic of their problems." *McCulloch, An Evaluation of the Remedies Available to the NLRB*, 56 LRR 262, (June 29, 1964)

Another Board member, John Fanning, referred to the matter as follows:

"As I stated in my dissent in the first *Fibreboard* case, the duty of an employer to bargain with his employees' representative concerning subcontracting operations had been considered and decided more than 15 years ago (*Timken Roller Bearing Company*, 70 NLRB 500). However, today the twin problems of chronic unemployment and automation have given greater dimension to the issues involved;" Fanning, *The Duty to Bargain in 1962*, 51 LRRM 87 (1962).

A third Board member, *Gerald A. Brown* stated:

"Before turning to some analysis of the changes, a word about my concept of the role of the NLRB is

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procedure by the Board here imposes a burden on the parties and lacks the bearing expected of the quasi-judicial agency. It is also contrary to the requirement of this court that "the orderly function of the process of review requires that the grounds upon which the administrative agency relies be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943); *Phelps Dodge Corp., v. NLRB*, 313 U.S. 177 (1941).

appropriate. We are an administrative agency entrusted with translating a general public policy formulated by Congress into varied and changing factual situations. While we, of course, are limited by the statute under which we operate, extensive discretion is granted to permit accommodations to the changing patterns. The labor problems of 1962 resemble those of 1935 only in a semantical sense.

"The shadow of the future pretend an increasing tempo of change—not only from the continuing technological revolution of automation, but from the impact of the developing new countries and other phases of our international relations.

\* \* \*

"Thus, in my view the Board is unquestionably a *policymaking tribunal*." Brown, *Defense of Recent NLRB Reversals of Decisions*, 49 LRR 364 (February 9, 1962).

We submit that the new majority of the Board has not received any direction from Congress to assume the role of a policymaker with authority to regulate industry's implementation of technological change. Recent developments also refute this claim of such a mandate.

A Senate committee has studied the problem of technology and automation;<sup>\*</sup> a current Administration bill to establish a National Commission on Automation and Technological Progress has just been signed by President Johnson (August 1964); and a recent examination of the problem was also made in a report to the President from his Advisory Committee on Labor-Management Policy, entitled "*Labor-Management Policy Committee Report on Automation*," 49 LRRM 35 (1962). But in none of these studies, bills, or reports is there any

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<sup>\*</sup> "Toward Full Employment: Proposals for the Comprehensive Employment in the U. S.," Senate Committee on Labor & Public Welfare, 88th Cong., 2nd Session, Sen. Joseph S. Clark, Chairman.

authority for the Board to solve the problems of technological change.

Accordingly, we submit that the Board, without Congressional authority, is reaching out for new areas of control in its *Fibreboard* decision. The members of the NLRB do not have the competency or expertise to review this problem from all its aspects—productivity, modernization, and competition both domestic and foreign.

Further, the Board is not suited for this task because it tends to create confusion in this complex area rather than to afford a solution. Because of its lack of competency the Board sees the narrow rather than the overall picture of the problem. Its decisions create industrial relations problems which cause havoc to collective bargaining.

According to the Board, if there are restrictions on an employer's right to contract out this will somehow mean that "business operations may profitably continue and jobs may be preserved." *Town & Country Mfg. Co.*, 136 NLRB 1022 (1962). This may not always be true, however. *Unless an employer is free to use his independent business judgment the result is an inability to compete and a consequent loss in the very jobs the Board is seeking to protect.* On the other hand, an efficient operation provides more for investment, improvement, and expansion which in turn has the effect of increasing productivity and the over-all total number of jobs. This is the real answer to unemployment.

We urge this court to reverse the Board's *Fibreboard* decision. The Board can then devote its time and effort aimed at reducing industrial strife within the confines of the law enacted by Congress. The scope of the duty to bargain should not be expanded without explicit authority from the Congress.

## IV. CONCLUSION

We submit that the impact of the Board's decision, if sustained by this Court, will be a blow to the freedom of enterprise now enjoyed by employers throughout the country. It can eventually result in such a stranglehold on the initiative of employers that our economic growth will be irreparably damaged.

The new majority of the Board is reaching out for new areas of control without congressional authority. The *Fibreboard* decision subverts the constitutional requirement of separation of powers through its assumption of legislative authority.

For these reasons, we urge the Court to reverse the Board and the Court of Appeals for the District of Columbia and dismiss the complaint.

Respectfully submitted,

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## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Secs. 151 et seq.) are as follows:

## UNFAIR LABOR PRACTICES

Section 8(a) It shall be an unfair labor practice for and employer—

\* \* \* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

\* \* \* \* \*

(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employers to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . . and the execution of a written contract incorporating any agreement reached if requested by either party . . .



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# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 14

FIBREBOARD PAPER PRODUCTS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## OPINIONS BELOW

The opinion of the court of appeals (R. 171-178) is reported at 322 F. 2d 411. The Board's findings of fact and its original decision and order (R. 35-43, 44-62) are reported at 130 NLRB 1558; the Board's supplemental decision and order (R. 19-32) are reported at 138 NLRB 550.

## JURISDICTION

The judgment of the court of appeals was entered on July 3, 1963 (R. 179), and a petition for rehearing was denied on September 27, 1963 (R. 181). The petition for a writ of certiorari was filed on November 8, 1963, and was granted on January 6, 1964 (R.

183; 375 U.S. 963). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

#### STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 74-76.

#### QUESTIONS PRESENTED

1. Whether an employer's "contracting out" of maintenance work being done by employees in the bargaining unit is a statutory subject of collective bargaining under sections 8(d) and 9(a) of the National Labor Relations Act.

2. Whether an employer violated its duty to bargain under section 8(a)(5) by putting a decision to "contract out" such maintenance work into effect immediately upon the reopening of the existing collective bargaining agreement, without negotiation with the union.<sup>1</sup>

3. Whether the Board, in a case involving only a refusal to bargain, was empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein.

<sup>1</sup> Questions 1 and 2 break into its component parts the first of the two questions with respect to which certiorari was granted:

"Whether Petitioner was required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged."



## STATEMENT

Petitioner company operates 20 manufacturing plants in five States (R. 172, 46; 101).<sup>2</sup> Since 1937 the Union<sup>3</sup> has been the exclusive bargaining agent for a unit of maintenance employees at the company's Emeryville, California plant, which numbered about 50 men in 1959 (R. 172, 35; 75, 102). On May 26, 1959, the Union gave timely notice of its desire to modify the existing collective agreement, which would expire July 31, 1959. The Union also sought to arrange a bargaining session on the proposed modifications (R. 172, 35, 47; 152, 153). There was no meeting until July 27, four days before the end of the contract term and approximately two months after the Union's notice (R. 172-173, 49; 75, 106, 152-155).

In the meantime, the company had undertaken an intensive study of the possibility of "contracting out" all maintenance work, effective on the expiration of its collective bargaining agreements with the various labor organizations representing its more than 70 maintenance employees (R. 173; 57-58; 104-105, 125-127).<sup>4</sup> By July 27, the company had determined that it was spending approximately \$750,000 on its maintenance operations and that a substantial

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<sup>2</sup> References preceding a semicolon are to the facts as found by the Board and approved by the court below; those following are to the supporting evidence.

<sup>3</sup> East Bay Union of Machinists, Local 1304, United States Steelworkers of America, AFL-CIO.

<sup>4</sup> In addition to the approximately 50 maintenance employees covered by its agreement with the Union, the company had approximately 23 maintenance employees outside the major unit, who were represented by other unions (R. 122, 102, 75).

saving could be effected by contracting the work to one of four firms (R. 173, 57-58; 127-131). Accordingly, at the meeting with Union representatives the company delivered to them a letter, stating that it had reached "a definite decision" to let out the maintenance work effective August 1, 1959, and that "In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless." (R. 173, 49-50; 75-76, 117, 156.)

The Union protested that the company had no legal right to enter into a contract with a third party to do the work being performed by employees represented by the Union, and the meeting ended in discord (R. 50-51; 76, 118-119). On July 29, the Union sent a formal letter of protest to the company (R. 51; 157).

The parties met again on July 30 (R. 173, 52; 83-84, 120-121). By this date, the company had selected Fluor Maintenance, Incorporated as the contractor for the plant's maintenance work (R. 58; 79, 131-132, 137). At the opening of the meeting, the company's Industrial Relations Director, R. C. Thumann, distributed to the Union representatives copies of a letter, stating the company's view of the legal position and concluding (R. 53; 158-159):

As we stated in our letter of July 27, it appears to us that since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless. However, we repeat that we will be glad to discuss with you at your convenience any questions that you may have.

The Union representatives stated that they were ready to negotiate a collective bargaining agreement and asked for counterproposals to the Union's proposed modifications (R. 53; 84). The company refused (R. 53; 84).

In reply to questions about the company's reasons for contracting out the maintenance operations on such short notice, the Industrial Relations Director replied that it was more economical to have an independent contractor do the work, that the company had been considering the matter for "quite a period of time" because of high maintenance costs, and that the final decision had not been reached until July 27, when the Union was promptly notified (R. 53; 85-86). He added that, if the shortness of notice disturbed the Union, a deferral of the contracting to Fluor might be arranged (R. 86, 121). At the close of the meeting, all present signed the attendance record; Thumann added the following notation beside the names of the company representatives (R. 89, 122, 159):

These representatives of Fibreboard are not in attendance for Contract Negotiations but to restate their opinion that negotiations for a new contract would be pointless in view of management's intention to contract out powerhouse and maintenance work.

The next day, July 31, 1959, the company distributed termination notices to all its maintenance employees; and the Union posted a picket line (R. 56; 92, 96, 165). Fluor started performing the maintenance work with the midnight shift, although its contract

(which was made retroactive to August 1) was not formally signed until several days later (R. 56; 95, 123). Because qualified personnel were not immediately available, Fluor was unable to furnish a full force of maintenance employees until August 24 (R. 123-124).

Upon the foregoing fact the Board found that the company's motive in contracting out its maintenance work was economic rather than anti-union. It dismissed the complaint insofar as it alleged that the company had discriminated against union members in violation of section 8(a)(3) of the Act. (R. 35, 57-61.) The Board (by a two to one vote) also concluded that the company "violated Section 8(a)(5) by unilaterally subcontracting its maintenance work without bargaining with the \* \* \* [Union] over its decision to do so" (R. 24-25). The latter ruling applied the doctrine laid down in *Town & Country Manufacturing Company, Inc.*; 136 NLRB 1022, where the full Board (with two Members dissenting) held "that a management decision to subcontract work out of an existing unit, albeit for economic reasons, was a mandatory bargaining subject" (R. 20).<sup>5</sup>

The Board ordered the company to reinstitute the maintenance operation previously performed by its employees represented by the Union, to reinstate the

<sup>5</sup> The Board had originally dismissed the 8(a)(5) portion of the complaint in the instant case on the ground that a decision to subcontract was not a bargaining matter (R. 35-43). The Union and the General Counsel filed timely petitions for rehearing (R. 19; 167), which the Board granted because it had, in *Town & Country, supra*, changed its view on the subcontracting issue.

employees to their former or substantially equivalent jobs with back pay, and to bargain collectively with the Union (R. 27).

#### SUMMARY OF ARGUMENT

### I

The "contracting out" of work done by employees in the bargaining unit is one of the subjects upon which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively. Sections 8(d) and 9(a) impose a duty to bargain about "terms and conditions of employment" or "conditions of employment." Since "conditions of employment" means literally the stipulations upon which men agree to hire or be employed, a provision concerning the contracting out of work of the bargaining unit is well within the literal meaning of the words. The words even more plainly cover termination of employment; and "contracting out" all the maintenance work in a plant to another employer is as indissolubly linked to the termination of the employment of the original maintenance employees as the two sides of a coin.

The same conclusion follows even if one looks to factors other than the literal sweep of the words. Since the term "bargain collectively" as used in the National Labor Relations Act "has been considered to absorb and give statutory approval to the philosophy of [collective] bargaining as worked out in the labor movement in the United States" (*Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346), it is appropriate to look to the practices actually followed in

collective bargaining in order to determine what subjects of collective bargaining are embraced within Sections 8(d) and 9(a). As a matter of fact "contracting out" (or "subcontracting") had been brought, widely and successfully, within the framework of collective bargaining. That is demonstrated by the provisions of hundreds of collective bargaining agreements, orders and recommendations of government agencies, arbitration awards and judicial decisions.

A prime purpose of the National Labor Relations Act is to promote the peaceful settlement of potential industrial disputes by subjecting issues between management and labor to the mediatory influence of negotiation. In enacting the Act Congress took note of the fact that refusal to confer and negotiate had been one of the most prolific causes of industrial strife. Experience demonstrates that contracting out and other management practices affecting job security are, in fact, often major issues between management and labor. Nothing in the statute can dispel the employees' concern. Nothing in the law remotely suggests that, if bargaining upon the issue is not mandatory, employees can be denied resort to economic weapons. To hold that contracting out is a statutory subject for bargaining would promote the fundamental purpose of the Act by bringing a troublesome problem within the framework Congress established as most conducive to just and peaceable industrial relations. To hold otherwise would leave either party free to withhold the issue from the creative and mediatory influence of joint negotiations,

leaving it to fester and perhaps to break out in economic violence. Since a statute should be interpreted to give effect to its purposes, wherever that construction is consistent with the words, the former interpretation of Sections 8(d) and 9(a) must be preferred.

To hold that the "contracting out" of work done by employees in the bargaining unit is a statutory subject of collective bargaining would not unreasonably interfere with industrial efficiency. The only conclusion which automatically follows from such a holding is that management and union must, under appropriate circumstances, bargain about any proposals upon the subject advanced by the other. Unilateral action would not automatically be rendered unfair. Whether management is required to bargain before letting a subcontract, and how extensive any required bargaining will have to be, will depend, in any given case, upon such circumstances as the terms of any collective bargaining agreement, any past practice establishing the *status quo*, the character of the subcontracting, any business exigencies, etc. The institutions of collective bargaining and the law defining the statutory duty to bargain collectively are both flexible enough to meet any urgent industrial needs. While management might sometimes find an absolute prerogative more consistent with its immediate interests, the "objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employ-



ment relationship" (*Wiley v. Livingston*, 376 U.S. 543, 549).

The decisions of this and other courts confirm the conclusion that "contracting out" is a subject of mandatory bargaining. *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330; *Local 24 v. Oliver*, 358 U.S. 283.

## II

In the circumstances of this case petitioner violated the duty to bargain collectively by substituting a labor contractor for all the employees in the bargaining unit without prior negotiation with the union. Unilateral action by an employer violates section 8(a)(5) if it is, in effect, a refusal to meet and negotiate with the employees' representatives about a statutory subject. That was the case here. Since the existing agreement had been reopened, it was a proper time for negotiations. Although the union made no request in advance of the contracting out, because it had no reason to suppose that action was imminent, petitioner cannot have had the slightest doubt about the union's desire to negotiate about a program abolishing the 50 jobs in the bargaining unit. Nor can it be seriously argued that the contract was let pursuant to an established procedure or because of a sudden emergency.

## III

The Board did not exceed its remedial powers in directing petitioner to resume the maintenance operation, reinstate the employees with back pay, and bargain with the union. Section 10(c) empowers the

Board to require any person who has committed an unfair labor practice "to take such affirmative action \* \* \* as will effectuate the policies of this Act." Restoration of the *status quo ante* tends to effectuate the policies of the Act by depriving the employer of advantage gained by the unfair labor practice and by assuring employees that, when they exercise their statutory rights and suffer in consequence, the law, despite delays in enforcement, will put them as nearly as possible in the same situation as if the law had been obeyed.

The Board went no farther in the present case. The order requires petitioner to restore the *status quo* as nearly as possible and then to bargain in good faith about contracting out the maintenance operation and any other statutory subjects, as it should have done in the beginning. Petitioner will have the same freedom as any other employer to formulate its bargaining position and to take unilateral action if no agreement is reached. The inconvenience and cost of resuming and carrying on, pending the bargaining, the maintenance operations now being performed by the labor contractor cannot be very great, because the work is being done in petitioner's plant, with its equipment and under its ultimate control. The burden, if any, was for the Board to weigh against the prejudice to the employees of leaving them to bargain as outsiders about petitioner's resumption of an operation which had been unlawfully transferred to the outside contractor.

The argument that the Board may not order reinstatement of employees with back pay is inconsistent

with the plain words of the statute and the substance of consistent administrative and judicial practice. The Board, with judicial approval, has consistently ordered reinstatement, discharging replacements if necessary, where an employer's refusal to bargain resulted in an unfair labor practice strike. Technically, violation of section 8(a)(3) may be involved in the refusal to rehire unfair labor practice strikers upon their request, but the substance of the matter is that the Board is restoring the *status quo ante* the violation of section 8(a)(5).

Since petitioner has failed to show that "the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act," the order should be enforced. *Virginia Electric Co. v. National Labor Relations Board*, 319 U.S. 533, 540.

#### ARGUMENT

##### *Introductory*

The present case impinges, in its broadest aspects, upon some of the most difficult and most important questions of labor-management relations. On the one hand lies the deep concern of employees with any management decision directly affecting the volume of work upon which their job security depends. On the other hand lies the equally vital interest of management in making and effectuating decisions concerning products, methods, equipment, scheduling, etc., that fall within its special competence by reason of its training and their relation to financial investment. Even narrowed to the subject matter more immediately involved—the "contracting out" of work of the kind done by employees in the bargaining

unit—the case is of concern to all industries which practice subcontracting.

For the foregoing reasons we have thought it advisable to present a more comprehensive discussion of the problem than required by the necessities of this particular case. In putting the problem in context, however, it is essential to define some of the terms and also to disentangle some related but fundamentally different questions.

1. The instant case is commonly said to raise the question whether “subcontracting” is a subject of mandatory bargaining under the National Labor Relations Act.<sup>6</sup> Unfortunately the term “subcontracting” has no precise meaning. It is sometimes used to describe a variety of business arrangements altogether different from that which forms the basis of the unfair labor practice charges in the present case.

One common form of subcontracting results from the arrangements in the building and construction industry whereby the general contractor who undertakes an over-all project (a dam, highway or office building) arranges for subcontractors to do specialized parts of the work with their own employees, typically electrical work, plumbing, painting, etc. In the construction industry subcontracting is standard

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<sup>6</sup> See, e.g., *Employer's Duty to Bargain About Subcontracting*, 64 Col. L. Rev. 294, 297-298, 305; *Labor Law Problems in Plant Relocation*, 77 Harv. L. Rev. 1100, 1103; Adams and Coleman, *Can Collective Bargaining Survive the Board?*, 52 Georgetown L.J. 366, 369-370; Burstein, *Subcontracting and Plant Removals*, 13 Lab. L.J. 405, 406-407; Freilicher, *Collective Bargaining and Contracting Out*, 23 Fed. Bar. J. 332, 332-334. Cf. Farmer, *Good Faith Bargaining Over Subcontracting*, 51 Georgetown L.J. 558, 565.

procedure. Few prime contractors complete a large project exclusively with their own direct employees.

Essentially the same form of subcontracting is exemplified by a practice common in defense industries whereby the prime contractor for the government undertakes to do such work as building airplanes or producing a weapons system, but arranges to have thousands of parts and sub-assemblies manufactured by subcontractors. Here again the prime contractor often lacks the competence or facilities to fabricate the parts or complete the sub-assemblies—components for the electronic guidance system in a missile, for example—and it is contemplated from the beginning, or even required by the Department of Defense, that much of the work will be subcontracted to those qualified to complete it.

So far as we are aware neither employees nor labor unions have seriously sought to bargain about the subcontracting of work the physical performance of which is clearly outside the normal scope of the employer's business and which is therefore of a kind not performed by his employees. The disposition of the present case should have no appreciable effect upon those forms of subcontracting and such problems as may arise out of them may safely be left to the future.<sup>7</sup>

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<sup>7</sup> We do not mean to imply that all subcontracting in defense industries is distinguishable from the problems discussed in this brief. A substantial part of such subcontracting must involve work which is at least arguably of the kind that might be done by the employer's own employees. Much of the reasoning sustaining the decision below would be applicable to the contracting out of work in the latter category.

Of much greater concern in labor-management relations are the "subcontracts" of work which might be done on the employer's own machines and by his regular employees. Even within this classification, the term "subcontracting" applies to a variety of arrangements, and practices differ from industry to industry and even from employer to employer. For example, in the manufacture of textiles there is often need for making hand repairs of the imperfections in the cloth that comes from the looms. One mill may have its own repair room. Another may regularly "subcontract" all the repair work to one of the local establishments often found in textile communities specializing in making hand repairs to cloth woven on the looms of others. A third mill may follow an intermediate course, maintaining a repair room with enough employees to handle the normal flow of work but subcontracting in times of peak production.

Essentially the same form of subcontracting is practiced by metal fabricators and assemblers of specialized machine work made to contract specifications rather than for subsequent sale on the open market. Such firms normally have a variety of lathes, drill presses and other machine tools. At any given time various tools are at work in the completion of outstanding orders. If the manufacturer takes a new contract—say, a contract for large marine valves—the decision whether to manufacture all the parts or to machine some and subcontract others would turn upon the work already scheduled for the machines required, the availability of employees with the neces-



sary skills, the scheduling of other commitments, upon comparative costs and a host of related questions. Some businesses have to make frequently recurring decisions about this kind of subcontracting. Their effect upon the employees will vary according to the size of the contract and the volume of other work in the shop.

Still another form of subcontracting (as the term is sometimes loosely used) involves bringing into the principal employer's plant an outside contractor and his employees who are engaged to perform in the shop operations previously performed by the employer's own employees in the bargaining unit. For example, an automobile assembly plant which employed its own window washers might decide to contract the work out to an independent concern which specialized in window-washing and would do essentially the same work with its own employees in place of those in the bargaining unit.

The present case involves a form of subcontracting essentially similar to that last described. The case is peculiar because the maintenance employees in petitioner's plant were organized in bargaining units separate from the production workers; and petitioner contracted out all its maintenance work. The same kind of work is now being done in the same place and usually under the same ultimate direction as before. The "contracting out," viewed realistically, has had only three practical consequences: (i) New men do the work in place of the employees who had been doing it. (ii) The labor contractor supplies the supervision in place of petitioner's foremen. (iii) The wages and other terms of employment under which the work was



done have been changed and will hereafter be fixed by the labor contractor, perhaps in conjunction with the union representing his employees, instead of by collective bargaining between petitioner and the union representing his employees. The net result has been the total destruction of the bargaining unit as well as the substitution of a wholly new group of employees to do the work of those in the unit with some consequent savings to the petitioner.

In the present case, therefore, there is no need for the Court to determine whether proposals relating to other forms of "subcontracting" are statutory subjects of collective bargaining. It is only fair to point out, however, that the Board's rationale extends at least to all "contracting out" of work of the kind normally done by employees in the bargaining unit, either by bringing the subcontractor and his employees into the plant or by sending work out of the plant to the subcontractor. We shall use the term "contracting out" to describe this form of arrangement.

2. The mutual rights and duties of employers and labor unions with respect to any putative subject of collective bargaining depend upon two distinct lines of analysis. In the instant case, therefore, the ultimate determination of whether the employer has committed an unfair labor practice under section 8(a)(5) depends upon two distinct questions, only one of which is discussed in petitioner's brief.

The threshold question is whether the subject upon which the employer is alleged to have refused to bargain is one to which that statutory duty can ever attach. Under sections 8(a)(5), 8(d) and 9(a) the duty

extends to "rates of pay, wages, hours of employment, or other conditions of employment" (section 9(a)) or to "wages, hours, and other terms and conditions of employment" (section 8(d)). Since the duty extends to each and every subject embraced within the quoted phrases,<sup>8</sup> the initial question is always whether the putative subject of bargaining—here the contracting out of plant maintenance work previously performed by employees, in the bargaining unit—comes within the phrases "conditions of employment" or "terms and conditions of employment" within the meaning of sections 8(d) and 9(a). In Point I we state the reasons for an affirmative answer in respect to "contracting out."

The second, separable question is what does the duty to bargain require of the employer or the union, in given circumstances, with respect to the particular statutory subject of collective bargaining. A holding that "contracting out" is a statutory subject of collective bargaining leads automatically to the conclusion that sections 8(a)(5) and 8(b)(3) require the employer and the union each to negotiate about any proposal upon the subject advanced by the other under appropriate circumstances, but no further conclusion can be drawn without examining the scope and meaning of the statutory duty to bargain about the particular subject in the particular context. Thus, many of the conse-

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<sup>8</sup> *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247 (C.A. 7), certiorari denied on this point, 336 U.S. 960; *National Labor Relations Board v. J. H. Allison & Co.*, 165 F. 2d 766 (C.A. 6), certiorari denied, 335 U.S. 814; *Richfield Oil Corp. v. National Labor Relations Board*, 231 F. 2d 717 (C.A.D.C.), certiorari denied, 351 U.S. 909.

quences of holding that "contracting out" is a statutory subject of collective bargaining turn upon open questions concerning the application of sections 8(a)(5) and 8(b)(3).

Specifically, it is wrong to assume that if contracting out is a subject of mandatory collective bargaining, it is *per se* an unfair labor practice for an employer to let such a contract without consulting the union. An employer is free to bargain for the union's contractual assent to its contracting out work during the term of a proposed collective bargaining agreement and, if such a clause is negotiated, the employer may take unilateral action without consulting the union (see pp. 45-46 below). Even in the absence of a collective agreement, such circumstances as the nature of the employer's business, the character of the particular subcontract, the employer's expressed willingness to discuss the subject before letting further subcontracts, and an established custom treating recurrent subcontracting as a management function might well lead to a ruling that the unilateral letting of a particular subcontract was not an unfair labor practice under section 8(a)(5) (see pp. 48-49 below). None of this Court's decisions suggests that the Act forbids all unilateral action on all statutory subjects of bargaining. See *National Labor Relations Board v. Katz*, 369 U.S. 736, 746.

In the present case the principles governing an employer's right to take unilateral action are material chiefly as they make up part of the legal context in which the Court must decide the central question whether proposals concerning the contracting out of

work in the bargaining unit are statutory subjects of collective bargaining. Petitioner apparently concedes that, if contracting out is a statutory subject of bargaining, the unilateral action on its part would violate section 8(a)(5). We believe that the concession is well-founded for the reasons stated in Point II.

# I

CONTRACTING OUT MAINTENANCE WORK OF THE KIND DONE BY EMPLOYEES IN THE BARGAINING UNIT IS A STATUTORY SUBJECT OF BARGAINING

A. THE PLAIN MEANING OF THE WORDS "TERMS AND CONDITIONS OF EMPLOYMENT" SHOWS THAT "CONTRACTING OUT" IS A STATUTORY SUBJECT OF COLLECTIVE BARGAINING.

Section 8(a)(5) of the National Labor Relations Act declares it an unfair labor practice for an employer—

to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9(a), which was part of the original Wagner Act, provides that the representatives designated by the majority shall be the exclusive representatives—

for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Section 8(d), added in 1947 by the Taft-Hartley amendments, provides:

\* \* \* to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with

respect to wages, hours, and other terms and conditions of employment \* \* \*.

The phrases "conditions of employment" and "terms and conditions of employment" were used in their broadest sense. In 1947 Congress considered and rejected proposals of narrower words, which were offered in an effort to curtail the scope of labor-management negotiations.<sup>9</sup> In its ordinary meaning the word "terms" means (Webster's International Dictionary, 2d ed.):

Propositions, limitations, or provisions, stated or offered, as in contracts, for the acceptance of another and determining the nature and scope of the agreement.

The word "conditions" is even broader. It is defined as (*ibid.*):

Something established or agreed upon as a requisite to the doing or taking effect of something else; a stipulation or provision.

Thus, the "terms and conditions of employment" to which sections 8(d) and 9(a) refer are any stipulations under which the workers agree to be employed,

<sup>9</sup> H.R. 3020, 80th Cong., 1st Sess., Sec. 2(11), 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 163-167; House Report No. 245, 80th Cong., 1st Sess., 22-23, 1 Leg. Hist. 313-314. The change was opposed on the ground, *inter alia*, that it would make nonmandatory a number of subjects, including subcontracting, which were "traditionally the subject matter of collective bargaining in some industries or in certain regions of the country." House Minority Report No. 245, 80th Cong., 1st Sess., 71, 1 Leg. Hist. 362. The Senate resisted the proposed change, and the Wagner Act definition of bargaining subjects was left unchanged. See 93 Cong. Rec. 6443, 2 Leg. Hist. 1539.

and the management to employ them. Except as other language or the policy of the Act may confine the meaning, they verbally embrace any provision which either party wishes to put in the agreement.

It may be objected that the literal reading would give labor unions a statutory right to bargain about a host of subjects heretofore regarded as "management prerogatives," including prices, types of product, volume of production, and even methods of financing. Such is doubtless the logical, theoretical consequence of giving effect to the literal sweep of words, although the Board has never gone so far.<sup>10</sup> As a practical matter, however, the scope of collective

<sup>10</sup> The Board with court approval has found that certain subjects lie outside the area of mandatory bargaining, although they are nonetheless permissible subjects of bargaining. In addition to *National Labor Relations Board v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, see: *National Labor Relations Board v. Davison*, 318 F. 2d 550, 555-557 (C.A. 4) (proposal that union indemnifying employer for losses resulting from retaliatory action by other unions); *Local 164, Printers v. National Labor Relations Board*, 293 F. 2d 133 (C.A.D.C.), certiorari denied, 368 U.S. 824 (proposal that employer post performance bond); *Jasper Blackburn Products Corp.*, 21 NLRB 1240, 1254-1256 (proposal that union post a performance bond); *National Labor Relations Board v. Dutton Telephone Co.*, 187 F. 2d 811, 812 (C.A. 5), certiorari denied, 342 U.S. 824 (proposal that union make itself amenable to suit in State courts); *Douds v. I.L.A.*, 147 F. Supp. 103, 111-112 (S.D. N.Y.), affirmed, 241 F. 2d 278, 282 (C.A. 2) (insistence on bargaining for employees outside the certified unit); *National Labor Relations Board v. Floor Decorators*, 317 F. 2d 269 (C.A. 6) (proposal that employer make contributions to an industry promotion fund); *Bethlehem Steel Co. v. National Labor Relations Board*, 320 F. 2d 615, 618-619 (C.A. 3), certiorari denied, 375 U.S. 984 (proposal that grievances be signed by individual employees).



bargaining is confined by the range of the employees' vital interests. Proposals concerning subcontracting are important subjects of collective bargaining in many industries because subcontracting is of intense concern to the workers. Every time management arranges to buy parts or otherwise subcontract work of the kind usually done by the company's own employees, fear among the employees' for their income and employment security is generated by the danger that the "subcontract" will reduce the amount of work available to them. The threat is the greater and the more immediate when the contract brings men from another firm into the plant to take over the jobs of the employer's own workers. The fear is reflected in collective bargaining practice and arbitration (see pp. 28-36 below). No legal formula confining the interpretation of "terms and conditions of employment" can eliminate the workers' intense concern. The only question, therefore, is whether the problems shall be resolved within the framework of collective bargaining established by national policy or left outside to fester without negotiation and then to break out in economic warfare (see pp. 37-42 below). The same is equally true of any other subject which becomes of such pressing importance to employees as to lead them to interject it into collective bargaining. To give the words "terms and conditions of employment" the full scope of their natural meaning, so as to include any stipulation which either party considers so vital as to wish to make it part of the bargain, gives effect to the basic policy of requiring the interchange of viewpoints and information in the hope



that mutual understanding may lead to an accommodation where there might otherwise be strife."

In the present case, however, it is unnecessary to delimit the full list of the statutory subjects of collective bargaining. In the first place, contracting out work done by employees in the bargaining unit directly and immediately affects the volume of work available and therefore determines whether the employees in the unit will continue to be employed. When petitioner contracted out its maintenance work, it thereby terminated the employment of more than 70 employees, including all of the 50 workers in the unit

<sup>11</sup> On page 16 of its brief petitioner quotes at length from an address delivered in 1956 by Mr. Justice Goldberg, then General Counsel to the United Steelworkers. 7 Proceedings of the National Academy of Arbitrators 118. The address very plainly did not express his "understanding of what was, and what was not, embraced by the statutory phrase, 'wages, hours and other terms and conditions of employment'" (Pet. Br. p. 16). First, the speaker was addressing himself solely to the question, what are management's reserved rights *under a collective bargaining agreement*. There is no reference to the statute and the most casual reading of the address is enough to make the limitation apparent.

Second, nothing in the address deals with contracting out work in the bargaining unit.

Third, the theme of the address, as we understand it, is that management can win respect for its "rights" only if it recognizes the right of labor to be heard when labor's "rights" are affected. When the issue is the installation of a new product or method of manufacturing, the initiation of the measure and the resulting effects upon wages and working conditions may be separable. The decision to contract out work in the bargaining unit often is inseparable, however, from the laying off of the employees who were doing it. Applying the theme of the address, this would seem to be a step involving "the rights of labor."

represented by the charging union. It would be entirely accurate to say that petitioner dismissed all its maintenance employees without prior negotiation. The two aspects of the step taken are as inseparable as the faces of a coin. Second, the Board was not extending collective bargaining into a novel field. "Subcontracting" has been widely accepted as a subject of collective bargaining because the realities of industrial life often make it an issue of no less direct concern to workers than to management (see pp. 28-36 below). These characteristics distinguish contracting out from other claimed "management prerogatives" upon which a union might theoretically seek to bargain.

Other matters directly involving tenure of employment have long been held within sections 8(d) and 9(a). Lay-offs and recalls,<sup>12</sup> seniority<sup>13</sup> and compulsory retirement<sup>14</sup> are all subjects of mandatory bar-

<sup>12</sup> *National Labor Relations Board v. Westinghouse Air Brake Co.*, 120 F. 2d 1004, 1006 (C.A. 3); *Southern Coach & Body Co.*, 141 NLRB 80, 81-82; *Stilley Plywood Co.*, 94 NLRB 932, 969, enforced *per curiam* on this point, 199 F. 2d 319 (C.A. 4), certiorari denied, 344 U.S. 933; *Eva-Ray Dress Mfg. Co.*, 88 NLRB 361, 362, enforced *per curiam*, 191 F. 2d 850 (C.A. 5); *West Boylston Mfg. Co.*, 87 NLRB 808, 811; *Hagy, Harrington & Marsh*, 74 NLRB 1455, 1456, 1470.

<sup>13</sup> *National Labor Relations Board v. Westinghouse Air Brake Co.*, *op. cit.*, *supra*; *National Labor Relations Board v. Century Cement Co.*, 208 F. 2d 84, 85-86 (C.A. 2); *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247, 252-253 (C.A. 7), certiorari denied on this point, 336 U.S. 960; *The Hughes Tool Co.*, 100 NLRB 208, 209, n. 4.

<sup>14</sup> *Inland Steel Co. v. National Labor Relations Board*, *op. cit.*, *supra*; *Allied Mills, Inc.*, 82 NLRB 854, n. 2, 862.

gaining; so are disciplinary discharges,<sup>15</sup> the union shop<sup>16</sup> and the hiring hall.<sup>17</sup>

Similar demands directly involving the amount of work available in a bargaining unit have also been treated, both in law and in practice, as involving terms and conditions of employment. Controversies over work assignments resulting in inter-union "jurisdictional disputes" are disputes over "terms or conditions of employment," and the employer has a duty to bargain over the assignment.<sup>18</sup> Technological changes displacing workers with machines fall in the same categories.<sup>19</sup> Neither can be fairly distinguished from "contracting out" in their effect upon the employees.

Nor can the "contracting out" involved in this case be excluded from sections 8(d) and 9(a) upon the ground that the step dealt with matters often left to managerial determination, such as what parts to fabricate and what to buy, what machines to install, what

<sup>15</sup> *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 360; *National Labor Relations Board v. Bachelder*, 120 F. 2d 574, 577 (C.A. 7).

<sup>16</sup> *National Labor Relations Board v. Andrew Jergens Co.*, 175 F. 2d 130, 133 (C.A. 9), certiorari denied, 338 U.S. 827; *Owens-Illinois Glass Co. v. National Labor Relations Board*, 176 F. 2d 172, 177 (C.A. 7); *Phelps Dodge Copper Products Corp.*, 96 NLRB 982, 989, and cases there cited. See, also, *National Labor Relations Board v. General Motors Corp.*, 373 U.S. 734.

<sup>17</sup> *Houston Chapter, Associated General Contractors of America*, 143 NLRB No. 43, June 28, 1963, 53 LRRM 1299.

<sup>18</sup> See *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 264-267; *National Labor Relations Board v. Radio and Television Broadcast Engineers, Local 1212*, 364 U.S. 573, 576-577, and cases there cited.

<sup>19</sup> *Renton News Record*, 136 NLRB 1294, discussed, n. 47, pp. 69-70, *infra*.

funds to invest in plant equipment rather than inventories, how to schedule the work, *et cetera*. While we think that such considerations properly come into play during the course of bargaining rather than in statutory interpretation,<sup>20</sup> they are largely irrelevant in the present case. The plant maintenance would have to be done in any event. It would be done in the plant. It would be directed, even scheduled, by petitioner. No capital investment was at stake, nor anything that could be said to affect the scope or character of the petitioner's business. With this kind of contracting out the whole weight of the problem, from the standpoint of management as well as labor, is on the questions, who will work and who will determine wages, hours and working conditions. Nothing of practical importance is involved in the area conventionally left to managerial decisions.<sup>20a</sup>

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<sup>20</sup> See Cox and Dunlop, *Regulation of Collective Bargaining by The National Labor Relations Board*, 63 Harv. L. Rev. 389, 401-405.

<sup>20a</sup> In this light, there is no substance to petitioner's contention (Br. 37-39) that it is meaningless to require bargaining about subcontracting because, by hypothesis, the services of the employees who would be bargaining are unwanted by the employer. Petitioner continues to require maintenance services, and the only question is whether those services are to be performed by its own employees or by the employees of another employer. As shown (pp. 40-41, below), it is not unlikely that the present employees and their representative would be able, if the subject were placed on the bargaining table, to work out an arrangement under which those employees could continue to perform the maintenance services.

**B. THE ESTABLISHED PRACTICE IN COLLECTIVE BARGAINING SHOWS THAT STIPULATIONS CONCERNING "CONTRACTING OUT" ARE "TERMS AND CONDITIONS OF EMPLOYMENT"**

The term "bargain collectively" as used in the National Labor Relations Act "has been considered to absorb and give statutory approval to the philosophy of [collective] bargaining as worked out in the labor movement in the United States" (*Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346, quoted with approval in *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395, 408). The same approach should be followed in particularizing the topics which sections 8(d) and 9(a) make subjects of mandatory collective bargaining. Industrial experience is the best test both of the depth of the workers' interest in managerial practices affecting them and also of their amenability to labor-management negotiations. "[T]he needs of the industrial world can be determined most accurately by examining the arrangements which management and labor have worked out through negotiation, trial and error. This is not a situation in which solutions satisfactory to the industry concerned may be detrimental to the rest of the community. If capital and labor are able to adjust questions concerning the allocation of responsibilities to their mutual satisfaction, society will gain nothing by imposing different answers" (Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 405-406).

Experience shows that subcontracting has been brought, both widely and successfully, within the framework of collective bargaining under the National Labor Relations Act. Many parties to collective bargaining relationships have long recognized that a contractual limitation on the employer's right to "contract out" may be essential to protect the negotiated job standards, as well as to safeguard the jobs of employees in the bargaining unit.<sup>21</sup> A study of 1,687 major collective bargaining contracts in effect at the beginning of 1959 shows that there were 378 with express limitations on contracting out work that might otherwise be available to employees in the bargaining unit.<sup>22</sup> The silence of the others is ambiguous for the arbitration cases cited below show that "subcontracting" is often a subject of collective bargaining even though no term of the labor agreement mentions it expressly.

The bulk of agreements that limit contracting out place only partial restrictions on the practice, but there is wide diversity in the arrangements negotiated

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<sup>21</sup> See Slichter, *et al.*, *The Impact of Collective Bargaining on Management*, pp. 284-285, 290-291 (Brookings Institution, 1960); Slichter, *Union Policies and Industrial Management*, pp. 291, 299-300, 437-441 (Brookings Institution, 1941); Lunden, *Subcontracting Clauses in Major Contracts*, 84 *Monthly Lab. Rev.* 579, 715; *Subcontracting Clauses in Major Collective Bargaining Agreements*, pp. 1-2, 9 (Bur. Lab Stat., Bull. No. 1304, 1961). See, also, Chandler, *Management Rights and Union Interests*, pp. 90-91, 240-241 (McGraw-Hill, 1964).

<sup>22</sup> *Subcontracting Clauses in Major Collective Bargaining Agreements*, p. 3 (Bur. Lab. Stat., Bull. No. 1304, 1961).



by the parties to meet their own particular needs. In some cases, an attempt is made in advance to specify the situations in which the contracting of work will be permissible. For example, the contract may authorize the employer to subcontract if he does not have the necessary equipment or skilled workers for the job; if the work is of a temporary nature or of a type not customarily performed by unit employees; if an "emergency" situation is presented; or if the employer cannot otherwise meet his orders during peak periods. On the other hand, the contract may preclude contracting out if unit employees are, or are about to be, placed on layoff; if the subcontractor is not under contract with the union; or if he does not adhere to the contract wage and other standards."

<sup>24</sup> Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 413-414; Lunden, *Subcontracting Clauses in Major Contracts*, 84 Monthly Lab. Rev. 579, 583, 585, 715, 717, 718, 719-722; *Subcontracting Clauses in Major Collective Bargaining Agreements*, pp. 5, 7, 10, 11, 13-16, 20-22, 25, 26, 31, 33 (Bur. Lab. Stat., Bull. No. 1304, 1961); *Collective Bargaining Provisions, Union and Management Functions, Rights and Responsibilities*, pp. 21-22, 22-23, 25, 26, 27-28 (Bur. Lab. Stat. Bull. No. 908-912, 1949); Slichter, *et al.*, *The Impact of Collective Bargaining on Management*, pp. 299-306 (Brookings Institution, 1960); BNA, 2 *Collective Bargaining Negotiations and Contracts*, 65: 181-183. See, also, CCH, *Labor Law Reporter, Union Contracts—Arbitration*, par. 59, 911.55, p. 85, 365 (Art. XXI); par. 59, 917.012, p. 85, 706 (Sec. 3); par. 59, 944.116, p. 86, 936 (Art. XLVII).

We do not here consider the question of the extent to which some of these clauses may now be illegal in view of the enactment in 1959 of section 8(e) (29 U.S.C. 158(e)). The *amicus curiae* brief filed by the National Association of Manufacturers is quite unsound, however, in arguing that all clauses restricting subcontracting are barred by section 8(e) (pp. 3-11). A distinction must be drawn between a subcontracting clause



In other cases, no attempt is made to specify the substantive conditions under which work may be contracted out; instead, the collective bargaining agreement establishes the procedures through which the decision on subcontracting is to be reached as each case arises. Thus, the agreement may provide for a specified period of advance notice to the union and an opportunity to be heard on proposed subcontracts; for union-management consultations about subcontracting; or, in rare instances, for unilateral employer action and union veto power.<sup>25</sup>

Express agreements of the parties limiting the right to contract out have been upheld by arbitrators and courts, in view of the legitimate employee and union interests served by such contractual limitations.<sup>26</sup>

aimed at protecting the job opportunities of employees in the bargaining unit and one whose thrust is at union representation or conditions of employment among the employees of another employer; the former is "primary" and outside the purview of Section 8(e). See *Meat and Highways Drivers v. National Labor Relations Board*, 56 LRRM 2570 (C.A.D.C.) June 25, 1964. See, also, Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1118-1119.

<sup>25</sup> BNA, 2 *Collective Bargaining Negotiations and Contracts*, 65: 184-185; Cox and Dunlop, *Regulation of Collective Bargaining, etc.*, 63 Harv. L. Rev. 389, 414-415; Lunden, *Subcontracting Clauses in Major Contracts*, 84 Monthly Lab. Rev. 579, 583-584, 715, 718; *Subcontracting Clauses in Major Collective Bargaining Agreements*, pp. 5-6, 14, 20, 22, 25, 31 (Bur. Lab. Stat., Bull. No. 1304, 1961); *Collective Bargaining Provisions, etc.*, pp. 20-21, 22, 27-28 (Bur. Lab. Stat., Bull. No. 908-13, 1949); Slichter, *et al.*, *The Impact of Collective Bargaining on Management*, pp. 294-299, 306-307 (Brookings Institution, 1960).

<sup>26</sup> See *Mencher v. B. Geller & Sons*, 96 N.Y.S. 2d 13, 19, 276 App. Div. 556: "The 'no-contracting' provisions \* \* \* have been incorporated in the collective labor agreements in this industry

The propriety and wisdom of including stipulations concerning subcontracting among the terms and conditions of employment in appropriate cases was recognized as early as World War II by the War Labor Board, which repeatedly recommended, and sometimes even directed, the execution of agreements limiting the contracting out of work normally done in the bargaining unit, in order to protect wage scales, working conditions, seniority rights and job security. See, e.g. *Associated Fur Coat and Trimming Manufacturers, Inc.*, 19 War Lab. Rep. 835, 847; *Dixie Manufacturing Co.*, 27 War Lab. Rep. 396, 397, 403; *Underwood Elliott Fisher Co.* 3 War Lab. Rep. 476, 480; *National Association of Glove Manufacturers for Fulton County, New York*, 4 War Lab. Rep. 307; 313-314; *Kuehne Chemical Co.*, 23 War Lab. Rep. 294, 296. Similarly, at least one Presidential Emergency Board appointed under the Railway Labor Act recommended that the contract resolving the labor dispute should include a restriction upon "subcontracting" because the unqualified right of management to contract out work of the bargaining unit—

would render the contract illusory; make it a mere "will, wish, or want" contract—or no con-

[the fur industry] since 1928 and have been enforced. They pertain to matters in which the union and its membership have a direct economic interest and are essentially for the benefit of the union and its members and for the maintenance and preservation of concededly desirable standards and working conditions in the industry." See also *Maisel v. Sigman*, 123 Misc. 714, 205 N.Y.S. 807, 815-817 (N.Y. Sup. Ct.); *Sell Mfg. Co. v. I.A.M.*, 50 LRRM 2671, 2672 (C.A. 8); *In re Jasper*, 33 LA 332 (N.Y. Sup. Ct.); *Chupka v. Lorens-Schneider Co., Inc.*, 51 LRRM 2376 (N.Y. Ct. App.).

tract at all; it would be merely an option under such a provision. The company could remove from the coverage of the contract any work it saw fit at any time and, of course, if the company could do that, it could, in effect, remove all the work [*Northwest Airlines, Inc.*, 5 LA 71, 81].

Even in the absence of specific mention in the contract, arbitral and judicial decisions have brought "subcontracting" within the framework of the collective bargaining relationship. Numerous experienced arbitrators have held that limitations upon some forms of "subcontracting" are implicit in "the very nature of a collective bargaining agreement" (*Kennecott Copper Corp. & International Brotherhood of Electrical Workers*, 34 LA 763), or in the express provisions of the particular contract.<sup>27</sup> Such a limitation

<sup>27</sup> The various factors considered by arbitrators in determining whether a particular instance of subcontracting violates "an implied contract limitation are similar to the conditions written into express subcontracting limitations by the parties to the contract—e.g., whether unit employees have been put or kept on layoff as a result of the subcontract, whether the subcontract is only temporary or to cover an emergency situation, whether the work involved is like that customarily performed by unit employees, whether the subcontracting is economically "necessary" because the employer lacks the specialized equipment or trained personnel for the job, whether the work subcontracted is calculated substantially to dissipate the unit, undercut the union, or evade the provisions of the contract. See *A. D. Juilliard Co., Inc.*, 21 LA 713, 724; *U.S. Potash Co.*, 37 LA 442; *Temco Aircraft Corp.*, 27 LA 233, 235; *Thompson Grinder Co.*, 27 LA 671, 673; *Electric Auto-Lite Co.*, 30 LA 449. See, also, the remarks of G. Allan Dash, Jr., in *Cornell Off-Campus Conference on the Arbitration of Two "Management Rights" Issues: Work Assignments and Contracting Out*, pp. 78-80 (N.Y. State, School of Ind. & Lab. Rel., 1960); Crawford, "The Arbitration

has been inferred from the clause granting recognition to the union as collective bargaining representative of the employees on the theory that, if the employer could unilaterally withdraw substantial amounts of work from the unit, he would have it in his power to subvert the wage and overtime provisions of the agreement or the job classification, seniority, and discharge clauses. This position was expressed in *Bridgeport Brass Co.*, 25 LA 151, 156:

As the Union rightly contends there is involved in this dispute an issue as basic as the Contract itself. The fundamental purpose of the Agreement is to recognize mutual rights and duties, and from the point of view of the Union to establish job security and satisfactory conditions of work. The Recognition clause \* \* \* establishes the rights of the Union as bargaining agent "with respect to rates of pay, wages, hours of employment and other conditions of employment," and if these rights can be ignored and the Company assumes the authority of unilateral action in [such matters], then no provision of the agreement has any stability.<sup>28</sup>

of Disputes Over Subcontracting." in *Challenges to Arbitration*, National Academy of Arbitrators, 30th Ann. Meeting, p. 65 (BNA, 1960).

<sup>28</sup> Note also the following:

(1) *Celamex Corp. of America*, 14 LA 31, 35: "It is well recognized that one of the purposes of a collective bargaining agreement, and particularly the seniority provisions contained in the existing Agreement, is to assure employees within the bargaining unit some measure of job security, but to allow what the Company here did would in no time make meaningless and of no value these provisions of the Agreement which may not be the subject of unilateral change during its term."

(2) *Thompson Grinder Co.*, 27 LA 671, 674: "If the Com-

On the same basis, arbitrators have rejected the contention that a general management rights clause automatically gives the employer the right to contract out at will work done by employees in the bargaining unit. See, e.g., *Gulf-Oil Corp.*, 33 LA 852, 855. See also *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 391 v. Webster Electric Co.*, 299 F. 2d 195 (C.A. 7); *District Lodge No. 1, International Association of Machinists, AFL-CIO v. Crown Cork and Seal Co., Inc.*, 47 LRRM 2615 (E.D. Pa.); *International Union of Electrical Workers v. General Electric Co.*, 56 LRRM 2289 (C.A. 2), May 26, 1964, petition for certiorari filed, No. 413, this Term.

Other arbitrators have reached the contrary conclusion upon the facts before them, holding that, in the absence of an express limitation upon management's freedom to subcontract, none would be im-

pany could thus abolish the labor force, it could, one by one, or group by group, abolish all classifications and rates of pay, and in effect nullify the entire agreement by the simple device of employing contractors."

(3) *Journal Publishing Co.*, 22 LA 108, 112: "Union status and the stability of the bargaining unit are the very foundation of the bargaining relationship."

See, in addition, *Pacific Laundry & Dry Cleaning Co.*, 39 LA 676, 684; *U.S. Potash Co.*, 37 LA 442, 446-448; *Mead Paper Corp.*, 37 LA 342; *Container Corp. of America*, 37 LA 252, 253; *Vulcan Rivet & Bolt Corp.*, 36 LA 871, 872. *Electric Auto-Lite Co.*, 30 LA 449, 454-455; *A. D. Juilliard Co., Inc.*, 21 LA 713, 724; *Hearst Consolidated Publications & Newspaper Guild*, 26 LA 723, 726; *Stockholders Publishing Co.*, 16 LA 644, 649-650.

plied from the recognition or seniority clauses or other conventional provisions.”

It is immaterial whether the cases can be reconciled by reference to the particular contracts or to the particular types of subcontracting. Nor is there need to determine which view should be preferred. The important point for present purposes is that the problems of contracting out are constantly being resolved within the framework of collective agreements and grievance arbitration. As this Court said in holding that the lower courts had erred in refusing to refer a similar dispute to arbitration under the arbitration clause of the applicable collective agreement (*United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584):

Contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators.<sup>29</sup>

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<sup>29</sup> *Black-Clawson Co.*, 34 LA 215, 218, 220-221; *Wisconsin Natural Gas Co.*, 31 LA 880, 885; *Bethlehem Steel Co.*, 30 LA 678, 682, note and cases there cited.

<sup>30</sup> The Court quoted (363 U.S. at 584, n. 8) from *Celanese Corp. of America*, 83 LA 925, 941, where the arbitrator in a grievance over contracting out of work said:

“In my research I have located 64 published decisions which have been concerned with this issue covering a wide range of factual situations but all of them with the common characteristic—i.e., the contracting-out of work involved occurred under an Agreement that contained no provision that specifically mentioned contracting-out of work.”

A concurring opinion (joined by three members of the Court) pointed out that the reason why the courts should be slow to find that the contract does not cover the subject of contracting out is that the consequence of the contrary conclusion is that the employer “was free completely to destroy the collective bargaining agreement by contracting out all the work.” 363 U.S. 569 (footnote), 572.



C. THE PURPOSES OF THE NATIONAL LABOR RELATIONS ACT WILL, BE  
ADVANCED BY TREATING "CONTRACTING OUT" AS A STATUTORY  
SUBJECT OF COLLECTIVE BARGAINING

The pressing interest of employees in "contracting out" and similar practices that threaten their job security is evident from the collective bargaining agreements and arbitration proceedings just discussed. Many observers believe that in the current economic milieu employees are more concerned about job security than wages and hours or union status. The pace of economic and technological change has riveted employers' attention upon practices affecting the volume of work available to ~~them~~ <sup>their employees</sup>. "One of the most inflammatory issues in labor-management relations today is the growing management practice of 'subcontracting out.'" *Inside vs. Outside*, 65 *Fortune* 215 (May 1962). See also Slichter, et al., *The Impact of Collective Bargaining on Management*, p. 289 (Brookings Institution, 1960); *Chandler, Management Rights and Union Interests*, pp. 7, 225 (McGraw-Hill, 1964). Under such conditions, one can be sure that employees not only will remain concerned about "subcontracting" but will use their economic strength, when driven to extremes, to protect their economic interests.

The issue before the Court, therefore, is not whether contracting out and other measures reducing the volume of work available to employees will be an issue between management and labor, nor whether unions may make such subcontracting the subject of collective action. The affirmative answers to those questions are established facts, which the interpretation of the statute cannot affect more than peripherally.



What the Court's interpretation of sections 8(d) and 9(a) will determine, is whether the problems will be resolved within or without the statutory framework. In industries in which collective bargaining is an established way of life, there will be collective bargaining about subcontracting whenever it touches the vital interests of employees regardless of how sections 8(d) and 9(a) are interpreted. There the chief effect will be to determine whether the statutory procedure must be followed or the bargaining is to be left at large. Where the employer has never wholeheartedly accepted collective bargaining and where he feels economically strong enough to assert a management prerogative without consulting the employees or their labor union, the rule established by the Court will determine whether the problem is to be subject to the creative and mediatory influence of joint discussion or left outside the Act to fester and perhaps break out in economic conflict.<sup>31</sup> Nothing in the statute denies the employees the right, where subcontracting is not covered by the contract, to resort to economic weapons against subcontracts which they oppose.

A statute must be interpreted to give effect to its purposes. A prime purpose of the National Labor Relations Act was to encourage the settlement of po-

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<sup>31</sup> Compare Fleming, "The Obligation to Bargain in Good Faith" in Shuster, *Public Policy and Collective Bargaining*, pp. 72-73 (Harper and Row, 1962):

"If bargaining demands having to do with job security are not within the mandatory bargaining area of 'wages, hours, and terms and conditions of employment,' the net result will be that one of the most important bargaining problems of the period will be outside the main stream of the very legislation which was designed to encourage collective bargaining \* \* \*."

tential industrial disputes by the process of negotiation between employers and the representatives of employees. The sponsors believed that collective bargaining would enable employers and employees to dig behind their prejudices and exchange their views with the result that agreement would be reached on many issues and the area of disagreement would be narrowed on others to the point where compromise was cheaper than battle. As this Court said in *National Labor Relations Board v. Jones and Laughlin Corp.*, 301 U.S. 1, 42, "Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances." As early as 1902 an industrial commission report noted—

The chief advantage which comes from the practice of periodically determining the conditions of labor by collective bargaining directly between employers and employees is, that thereby each side obtains a better understanding of the actual state of the industry, of the conditions which confront the other side, and of the motives which influence it. Most strikes and lockouts would not occur if each party understood exactly the position of the other.<sup>32</sup> \* \* \*

Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time those forces generate their own

<sup>32</sup> H.R. Doc. No. 380, 57th Cong., 1st Sess., 844 (1902).

compulsions and collective negotiations approach the ideal of informed persuasion.

To hold that contracting out is a subject of mandatory bargaining would effectuate the purpose of the Act to bring critical subjects of controversy between labor and management within the mediatory influence of negotiations. It would be foolish to suppose that collective bargaining can serve no useful purpose in respect to the various forms of subcontracting. Stickier issues have yielded to the process. The collective bargaining agreements cited above show that management and labor have bargained about the subject successfully in many different industries. The contracts exhibit a wide variety of potential solutions to any particular dispute. Arbitrators have also drawn distinctions and proposed solutions appropriate to the particular plant.

There are many solutions even to the question whether particular work shall be contracted out, as in the present case. Petitioner's fundamental problem apparently was the cost of its maintenance work. Fluor, which agreed to serve as labor contractor, asserted that it could perform the maintenance work more economically than petitioner by reducing the work force from 75 to 60 men, by cutting fringe benefits and overtime payments, and by pre-planning and scheduling the services to be performed (R. 149-150). There is some reason to believe that the differences in cost estimates were partly attributable to the previous unwillingness of employees in the bargaining unit to "work out of classification" (*e.g.*, for a machinist, when not using that skill, to do other

work). Confronted with a choice between losing their jobs and increasing their productivity the employees might have agreed to cooperate in finding ways of meeting the problem of costs. Undoubtedly several approaches were available. One was suggested by the court of appeals (R. 177)—

[T]he union, after hearing management's side of the problem, might concede the justice of the claims and agree to invoke union discipline to increase productivity and reduce costs. Specifically, it might offer a six months trial period in which either productivity would be increased with the existing force of \* \* \* men or maintained with a reduced force to effect the economies desired by management.<sup>33</sup>

No one can say whether a mutually satisfactory solution would have been found in this case or will be found in any other, but the national labor policy is founded upon the Congressional conclusion that the chances are good enough to warrant subjecting such

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<sup>33</sup> As the Court noted, in holding that the employer was obligated to furnish information in support of a claim of inability to pay increased wages: "Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions." *National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149, 152, and materials cited in n. 5. And see *Wall Street Journal*, June 10, 1964 (a local of the United Auto Workers agreed to invest in the plant, to take a pay cut, and change production standards in order to keep the Divco-Wayne Corp. from moving its bus-making operations south); *Wall Street Journal*, August 13, 1964 (two locals of the United Steelworkers agreed to accept a wage cut at Blaw-Knox Co.'s steel fabricating plant in order to keep the company from transferring operations to other plants).

issues to the process of collective negotiation. A holding that the subcontracting of work of the kind done by employees in the bargaining unit is a statutory subject of collective bargaining would advance a fundamental purpose of the National Labor Relations Act. The purpose would be truncated by a contrary interpretation.

**D. TO HOLD THAT "CONTRACTING OUT" OF WORK DONE BY EMPLOYEES IN THE BARGAINING UNIT IS A STATUTORY SUBJECT OF COLLECTIVE BARGAINING WOULD NOT UNREASONABLY INTERFERE WITH INDUSTRIAL EFFICIENCY**

The chief argument often raised against holding that contracting out is a subject of mandatory bargaining is that it would unduly hamper the management of industrial enterprises in putting into effect promptly decisions essential to greater efficiency and increased productivity.<sup>34</sup> In evaluating that argument, it is essential first to note the legal consequences of holding that the contracting out of work of the kind done by employees in the bargaining unit is within the scope of sections 8(d) and 9(a).

*First.* Such a holding would not put any automatic restriction upon the employer's freedom of action. His obligations arise from section 8(a)(5), as the union's duties arise from section 8(b)(3). If, as we submit, contracting out is a subject which sections 8(d) and 9(a) make bargainable, sections 8(a)(5)

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<sup>34</sup> Petitioner does not raise the above contention, perhaps because there is no factual foundation for it in the present case. The contention is raised, however, in the Amicus Briefs (see Brief of Electronic Industries Assoc. 5-11; Brief of Chamber of Commerce 4-8; Brief of National Assoc. of Mfrs. 14-17).

and 8(d) impose upon the employer the duty, under some circumstances, to negotiate with the bargaining representative about any terms and conditions relating to contracting out which the union wishes to propose. Similarly, the representative must negotiate in good faith about any terms and conditions that the employer wishes to propose.

Those obligations arise when the employer and union are negotiating a new collective agreement. That is the only conclusion, however, that follows automatically upon a holding that contracting out is a subject of mandatory negotiation.

*Second.* The conclusion that "contracting out" is a subject of bargaining comprehended within sections 8(d) and 9(a) does *not* automatically lead to the further conclusion that an employer must always consult with the union before letting such a contract. The fairness or unfairness of unilateral action depends upon the interpretation of section 8(a)(5), as applied to each particular situation, including the terms of any relevant collective agreement and the customs and practices of the industry. Arguments based upon the need for leaving management freedom to effectuate prompt decisions should be directed to those questions. On the other hand, the necessary effect of construing "terms and conditions" of employment so as to exclude contracting out is to relieve the employer of any legal obligation ever to negotiate about any restriction upon an unlimited prerogative.

This is not a purely technical distinction. Labor-management negotiations concerning contracting out



may take either of two forms. The bargaining may deal with the procedure and substantive rules to be followed during the term of the agreement when the prospect of letting particular contracts becomes real—provisions to be written into a collective agreement governing the employer-employee relationship for a substantial period of time. In those contract negotiations there is no problem of immediate operational decisions and no greater need for unilateral action than in fixing any other term of employment.

On the other hand, the union may be concerned about the letting of a particular subcontract. Such problems arise from time to time, usually without relation to the periodic negotiation of collective bargaining agreements. In some industries decisions concerning subcontracting are made weekly or monthly; in others they recur infrequently. The decision is operational. It may turn on problems of financial management, scheduling, cost and labor supply within management's special expertise. Its effect upon the employees would also depend upon many circumstances. Similarly, one can imagine some cases in which business exigencies would necessitate prompt action but others in which there would be ample time for detailed negotiation. The problem of letting a particular subcontract may arise (1) during the term of a collective bargaining agreement or (2) in the absence of an existing agreement.

(1) If the parties deal with future subcontracting in their collective bargaining agreement, the problem of unilateral action is removed to the sphere of contract administration. One of the strengths of collec-



tive bargaining has been its capacity for creating procedures and substantive rules suited to the needs of the industry and even the particular business. We have already called attention to the variety of contract stipulations negotiated between management and labor arranging for the handling of subcontracts as the occasions arise during the term of the collective bargaining agreement." While one extreme calls for vesting absolute freedom to subcontract in management and the other extreme bars subcontracting without the consent of the union, there is a wide range of intermediate accommodations apparently securing the most vital interests of both employers and employees according to the precise industrial circumstances. The place to work out a framework for future subcontracting that takes into account the needs of the business, the kinds of subcontracting involved, the role of management's specialized skill and the host of other relevant considerations varying from business to business, is in the periodic contract negotiations. Cox and Dunlop, *op. cit. supra*.

The negotiated agreement effectively fixes the parties' subsequent duties. If he is acting in good faith, the employer is legally free to negotiate even for a clause securing him the right to let subcontracts without consulting the union. *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395; *Peerless Distributing Co.*, 144 NLRB No. 142, November 13, 1963, 54 LRRM 1285. Such a clause would be a defense against any charge of refusal to bargain based upon unilateral action during the term

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<sup>25</sup> See pp. 29-31, *supra*.

of the agreement. *General Controls Co.*, 88 NLRB 1341, 1342; *The Hughes Tool Co.*, 100 NLRB 208, 209; *Leroy Machine Co.*, 147 NLRB No. 140, June 30, 1964, 56 LRRM 1369. See, also, *Phelps Dodge Copper Products Corp.*, 96 NLRB 982; *Arco Mfg. Co.*, 111 NLRB 729, 732-733. If the extent of the contractual provision permitting subcontracting were disputed and the controversy were arbitrable under the contract, adherence to the contract procedure would normally be a "defense" to charges under section 8(a)(5). *Dowd Box Co. v. Courtney*, 368 U.S. 502, 510-511; *United Telephone Co. of the West*, 112 NLRB 779. While management may not always be able to negotiate the kind of clause that it desires, because of the opposite interests of the employees, the accommodation resulting from the free interplay of the opposing forces is likely to be a better arrangement for the particular parties, in their peculiar situation, than any solution the law might dictate as a uniform rule for all industries. It is there that the problem of the unilateral letting of subcontracts should be resolved.

The situation is more complicated if the parties sign a collective agreement without express provision for subcontracting. One solution is to treat the parties as if no agreement were in force. Another view is that there are many matters, which inevitably pass unmentioned, as to which every contract necessarily assumes a continuation of the *status quo*. Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv. L. Rev.

1097. The Board's decisions make the issue turn, in part, upon whether the subject was raised in the negotiations and, in part, upon the form of any proposals made and withdrawn. *Proctor Mfg. Corp.*, 131 NLRB 1166, 1169-1171; *The Press Co., Inc.*, 121 NLRB 976, 977-980; *Beacon Piece Dyeing & Finishing Co.*, 121 NLRB 953, 956-961; *Speidel Corp.*, 120 NLRB 733, 739-741; *Jacobs Mfg. Co.*, 94 NLRB 1214, enforced, 196 F. 2d 680, 683-684 (C.A. 2). Thus, in *National Labor Relations Board v. Adams Dairy*, 322 F. 2d 553 (C.A. 8), now pending upon petition for certiorari, No. 25, this Term, the Board held that the union's abandonment in collective bargaining of its request for a contractual prohibition upon subcontracting did not waive its statutory right to be notified and negotiate before the employer replaced its driver-salesmen employees with "independent distributors" who covered the same routes but bought and resold the dairy products.<sup>36</sup>

That problem, however, is not involved in this case. There is no necessary relation between the only issue raised by petitioner—is contracting out within the subject matter of statutory bargaining—and the question, what effect has a collective agreement upon the duty to bargain about subjects not mentioned therein. The latter question is not confined to subcontracting; it has arisen even more sharply with reference to conceded subjects of collective bargaining such as pen-

<sup>36</sup> The Board's reasons for its view have recently been amplified. See *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB No. 133, June 30, 1964, 56 LRRM 1321. For a critical analysis, see Farmer, *Good Faith Bargaining Over Subcontracting*, 51 Georgetown L.J. 558, 571-577.

sions and insurance. It need not be decided here because petitioner waited until the existing collective bargaining agreement had been reopened.

(2) In the absence of an existing agreement the problem of unilateral action must be resolved solely by reference to the statutory duty "to bargain collectively." Neither the Board nor the courts have had occasion to examine the problem in all its ramifications, nor do we attempt such an analysis in the present case. It is enough to point out the basis for our insistence that a holding that subcontracting is a subject for statutory bargaining does not automatically lead to the conclusion that, in the absence of an existing agreement on the subject, there is always an absolute duty to engage in full negotiations before any contract can be let.

The permissibility of unilateral subcontracting would seem to depend largely upon the circumstances of the particular case. In the instant case the contract letting out the work to Fluor was unusual, both in the sense that most concerns do their own maintenance work of the kind involved and also in the sense that the letting of such contracts was not a recurrent event, in an established pattern, resulting from the nature of the employer's business. The problem would be altogether different if the employer was regularly engaged in subcontracting, according to the needs of the business, and the union, although the collective agreements were silent, had always accepted the practice in silence without seeking to negotiate. In *National Labor Relations Board v. Katz*, 369 U.S. 736, the Court held that "an employer's unilateral

change in conditions of employment under negotiation is \* \* \* a violation of § 8(a)(5)" (p. 743) because it is "tantamount to an outright refusal to negotiate that subject" (p. 746), but the Court reserved judgment as to whether "there might be circumstances which the Board could or should accept as excusing or justifying unilateral action" (p. 748). Indeed, the opinion suggests that unilateral action which follows a familiar past practice—in effect "a mere continuation of the status quo"—may not be an unfair labor practice *per se* (p. 746). Whether that result is appropriate in some cases of subcontracting can be decided when the question is raised in a particular case. Another possibly relevant circumstance may be the existence of business exigencies demanding action before negotiations could be undertaken. Again, some things may depend upon the kind of subcontracting. We do not anticipate the answers to such questions. Our point is that the questions can fairly be left open for the present because it is in defining the duty to bargain that past practice, business exigencies and the distinctions between the varieties of "subcontracting" should be taken into account—not in the interpretation of the critical phrases determining the subjects of statutory bargaining.

*Third.* Just as sections 8(a)(5) and 8(d) leave a measure of flexibility with respect to unilateral action so are the statutory requirements concerning the character and length of negotiations adaptable to the character of the subcontracting and the exigencies of the particular business situation. An employer is under no duty to yield to the union. The employer's

duty, as the Board explained in the leading case on subcontracting, is only to bargain in good faith. The "obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment" (*Town & Country Mfg. Co.*, 136 NLRB 1022, 1027).

The amount of time and discussion required to satisfy the statutory obligation "to meet at reasonable times and confer in good faith" would vary with the circumstances. Ordinarily, before the employer reaches a final decision to take action, he must meet with the union, if it so desires, and give it the reasons for his proposed action. He must hear in good faith any union arguments for a contrary policy. Alternatives must be explored. Then either the employer and union will agree or the employer will make its decision and the union may resort to self-help. But the rule is not doctrinaire<sup>37</sup> and sometimes the employer may act sooner.

<sup>37</sup> See, e.g., *Exposition Cotton Mills*, 76 NLRB 1289, 1291-1292; *W.W. Cross & Co.*, 77 NLRB 1162, 1164-1167; *Massey Gin & Machine Works*, 78 NLRB 189, 198-202; *Braswell Motor Freight Lines*, 141 NLRB 1154, 1163, 1165; *Waukesha Sales & Service*, 137 NLRB 460, 468; *Instrument Division, Rockwell Register Corp.*, 142 NLRB 634, 642-643; *Schnell Tool & Die Corp.*, 144 NLRB No. 52, Sept. 6, 1963, 54 LRRM 1064; *The Celotex Corp.*, 146 NLRB No. 8, February 20, 1964, 55 LRRM 1238; *The Little Rock Downtowner, Inc.*, 148 NLRB No. 78, August 31, 1964, 57 LRRM 1052; *Lasko Metall Products*, 148 NLRB No. 104, Sept. 17, 1964. See also, *National Labor Relations Board v. Bradley Washfountain Co.*, 192 F. 2d 144, 150-152 (C.A. 7).



In an emergency it may not be possible to consult the union before taking action; in that event, the mere fact that the employer acted unilaterally would not warrant an inference of bad faith. Similarly, an inference of bad faith may not be justified where the work which the employer has unilaterally contracted out clearly is of a *de minimis* nature (e.g., the repair of a flat tire on a company truck), or beyond the technical capacity of his personnel or machines.<sup>38</sup> Moreover, even where the employer is able to, and does, meet with the union before reaching a final decision, the amount of negotiation required in order to satisfy the statutory standard must take into account the exigencies of the business and the potentials of further negotiations. If the economic forces pressing the employer to contract out the work are beyond the union's control and the union can offer no compensating concession, an "impasse" in the negotiations that would permit the employer to take action may be reached far sooner than where there was ample time for negotiation or the union was in a position to alleviate the conditions which motivated the employer's proposed action, and was advancing meaningful alternatives. The Act "does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position." *National Labor Relations Board v. American National Insurance Co.*, 343 U.S. 395, 404.<sup>39</sup>

<sup>38</sup> Compare the situations in which arbitrators have found exceptions to a contractual limitation on contracting out (n. 27, p. 33, *supra*).

<sup>39</sup> *Hartmann Luggage Company*, 145 NLRB No. 151, February 7, 1964, 55 LRRM 1206, illustrates the flexible nature of the bargaining obligation. There the employer had long been



Similarly, it is one thing for an employer, after brief discussion, to let one of the small contracts which have been a regular part of his business and upon which he must take action or miss the business opportunity, while he continues to negotiate a broader

in economic difficulties and at various times had discussed with the union the probability of contracting out the work of one of his plants. However, when the employer actually entered into the contract, he did not specifically apprise the union in advance of his proposed action; nevertheless, he did thereafter engage in prolonged discussions with the union before the situation was so far advanced as to preclude a reasonable resolution of the problems raised by the contract. The Board, considering all the circumstances, concluded that the employer had not violated his bargaining obligation under the Act. The Board held that, though the employer's action in signing the contract without first negotiating with the union was a "*prima facie* case of refusal to bargain," this was overcome by the employer's "overall conduct, both prior and subsequent to the execution of the subcontracting agreement" (slip decision, p. 2). Moreover, the Board, although sustaining the Trial Examiner's action in dismissing the complaint, declined to adopt his view that the bargaining obligation "necessarily required the Respondent to give the Union notice of the specific proposed subcontracting arrangement just 'at the time the Company was prepared to make a firm offer to [the subcontractor] or to accept a counter-offer from [it],' and to furnish the Union at that moment an opportunity to bargain precisely with reference thereto before consummating that subcontracting agreement" (slip decision, pp. 1-2).

See, also, *Montgomery Ward & Co.*, 137 NLRB 418 (employer did not violate his bargaining obligation when he established terminals for his truckdrivers at new locations without first negotiating with the union, for he had notified the union well in advance of his intention and the union had never asked for bargaining on the terminal issue); *Motoresearch Co.*, 138 NLRB 1490 (employer did not violate the Act in unilaterally subcontracting work to a subsidiary, since the union knew of the subcontracting and made no mention of it in 18 bargaining sessions).

accommodation for the future. It is quite another for him permanently to wipe out an entire bargaining unit without thorough discussion, when the decision just as well can be postponed a week or a month. Nothing in sections 8(a)(5) or 8(d) precludes the Board from taking such factors into account. There is every indication that the Board is aware of their importance.<sup>40</sup>

The freedom to negotiate mutually satisfactory arrangements concerning the future letting of other subcontracts, as the occasions arise, meets many of the fears that have been expressed concerning the danger that the necessity of collective bargaining about "contracting out" may unduly hamper management in meeting business opportunities and exigencies. Additional flexibility is introduced both by the legal principles governing the right to take unilateral action and by the kind of negotiation that is required to satisfy the obligation to bargain in good faith. No doubt employers remain subject to some restrictions upon the kind of freedom that might best serve their interests, assuming that employers always acted fairly and wisely without the necessity of consulting the representatives of their employees. The same argument can be made, upon the same assumption, about a host of traditional subjects of collective bargaining. The judgment Congress expressed in enacting the National Labor Relations Act. was that the interests of employees should be consulted, and that the public interest, which includes the interests of both employers and employees, would be best served by subjecting problems between labor and management

<sup>40</sup> See cases cited n. 39, pp. 51-52, and n. 47, pp. 69-71, above.

to the mediatory influence of collective bargaining. The words of the Court in *Wiley v. Livingston*, 376 U.S. 543, 549, are applicable here even though the case deals with a different subject:

The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. \* \* \*

E. THE DECISIONS OF THIS AND OTHER COURTS SHOW THAT "CONTRACTING OUT" IS A SUBJECT OF MANDATORY COLLECTIVE BARGAINING

In *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330, it appeared that the railroad, operating at a loss, had decided to abolish some stations and consolidate others, which would result in a reduction of the number of its employees. The railroad offered to negotiate about severance pay for the employees dismissed but refused to negotiate with the bargaining representative about its decision to abolish the jobs, contending that that was a management prerogative. When the union threatened a strike, the railroad sought an injunction, arguing that its issuance was not barred by the Norris-LaGuardia Act because the case was not one "involving or growing out of a labor dispute" (29 U.S.C. Sec. 104). The term "labor dispute" is defined in the Norris-LaGuardia Act as "any controversy concerning terms or conditions of employment"

(29 U.S.C. Sec. 113(c)). The Court rejected the railroad's contention, saying (362 U.S. at 335-336)—

Unless the literal language of this definition is to be ignored, it squarely covers this controversy. \* \* \*

Plainly the controversy here relates to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement. The change desired just as plainly referred to "conditions of employment" of the the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. \* \* \*

The Court also rejected the railroad's argument that the union was acting unlawfully under the Railway Labor Act in pressing its demand that the railroad bargain collectively about the closing of the stations (p. 339):

Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads assert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152, First.

The quoted phrase from the Railway Labor Act is certainly no broader than sections 8(d) and 9(a) of the National Labor Relations Act. The latter are

couched in phrases substantially identical with the Norris-LaGuardia Act; indeed, the definition of labor dispute in section 2(9) of the National Labor Relations Act is taken from the earlier Norris-LaGuardia Act, and it can hardly be supposed that the words "terms or conditions of employment," in section 2(9) carry a different meaning than the same words in sections 8(d) and 9(a). Nor is there any plausible basis for saying that shutting down part of a company's operation with the resulting discharge of employees involves "terms or conditions of employment" while contracting out the work with the same consequence does not. Petitioner's efforts to distinguish the case as one involving only the Norris-LaGuardia Act (Br. 23-25) overlook not only the nexus between the statutes but also, the Court's explicit mention of the duty to bargain.

*Local 24 v. Oliver*, 358 U.S. 283, is also in point. At issue was the validity under the Ohio antitrust laws of Article XXXII of a collective bargaining agreement which fixed the minimum rental to be paid by motor carriers who leased vehicles to be driven by their owners instead of the carriers' employees. In holding that the National Labor Relations Act preempted the field against the application of the Ohio antitrust laws, the Court readily concluded (pp. 294-295) that—

[T]he obligation under § 8(d) on the carriers and their employees to bargain collectively "with respect to wages, hours, and other conditions of employment" and to embody their understanding in "a written contract incorporating any

agreement reached," found an expression in the subject matter of Article XXXII. \* \* \*

The substitution of owner operators driving their own trucks for a carrier's trucks driven by its own employees is virtually a form of subcontracting, for the only difference is that the work of employees in the bargaining unit is let out piece meal rather than in a lump. Indeed, in reaching its conclusion the Court cited *Timken Roller Bearing Co.*, 70 NLRB 500, 518, reversed on other grounds, 161 F. 2d 949, (C.A. 6), where the Board had held that sections 8(a) (5) and 9(a) require an employer to bargain about the subcontracting of work which may remove jobs from the bargaining unit.<sup>41</sup>

Although decisions of the courts of appeals are not uniform, a good number of them give strong support to the view that subcontracting is a subject on which the employer has a duty to bargain under section 8(a) (5). In some, which are distinguishable on their facts because there was a finding that the decision to subcontract, or to shut down an operation, was motivated by the desire to interfere with union organization, the employer's motivation was technically irrelevant to the charge of refusal to bargain and the rationale was in fact the same as the reasoning below in the instant case. *National Labor Relations Board v. Brown-Dunkin Co.*, 287 F. 2d 17 (C.A. 10); *Town & Country Mfg. Co. v. National Labor Relations Board*, 316 F. 2d 846, 847 (C.A. 5); *National Labor Relations Board v. Preston Feed Corp.*, 309 F. 2d 346 (C.A. 4); *National Labor Relations Board v. Savoy*

<sup>41</sup> See pp. 58-60 below.



*Laundry, Inc.*, 327 F. 2d 370 (C.A. 2); *National Labor Relations Board v. Kelly & Picerne, Inc.*, 298 F. 2d 895 (C.A. 1). Contra, *National Labor Relations Board v. Adams Dairy Inc.*, 322 F. 2d 553 (C.A. 8), pending on petition for certiorari, No. 25, this Term.

Petitioner's argument (Br. 14-15, 30-36) that an administrative interpretation had been engrafted upon the statute by a consistent course of administrative interpretation, fails for two reasons.

First, it is historically inaccurate. The administrative interpretation was neither consistent nor well-established. *Brown-McLaren Mfg. Co.*, 34 NLRB 984, the first case cited by petitioner, is too long and complicated an opinion for a summary to be useful, but we believe that anyone reading the opinion will agree that the ruling that the employer did not refuse to bargain upon a particular occasion rested not upon an interpretation of the phrase "terms and conditions of employment" but largely upon the view that the subject had been exhausted in prior negotiations (see pp. 1006-1007). In *Mahoning Mining Company*, 61 NLRB 792, the opinion very clearly shows (pp. 796, 802-804) that the issue was not whether there was a duty to bargain about the letting of the contracts, but whether the respondent was the employer of the men working in the mines after the contracts had been let.

Thus, the first case in which the Board really considered whether there was a duty to bargain about subcontracting was *Timken Roller Bearing Co.*, 70 NLRB 500, reversed on other grounds, 161 F. 2d 949 (C.A. 6). Petitioner seeks to brush the ruling aside as a minor point in a case with many issues, but



the Board's consideration appears quite thorough. The trial examiner discussed the subject at length (p. 518):

Without attempting generally to delimit the subject matter properly included within the scope of collective bargaining, it seems apparent that the [employer's] system of subcontracting work may vitally affect its employees by progressively undermining their tenure of employment in removing more and more work, and hence more and more jobs, from the unit. \* \* \* It is the [employer's] duty to sit down and discuss these matters with the Union when requested to do so. During such discussion it may develop, for example, that the Union will engage to supply sufficient skilled labor in the crafts in question, so that more work may be done by the [employer's] employees and less by workers outside the unit; it might be that the [employer] will convince the bargaining representative that there is no reasonable alternative to a continuation of the [employer's] present practice in this respect; or some other and presently unthought of solution agreeable to both parties may suggest itself.

On none of the issues now dividing the parties is the [employer] compelled to reach an agreement with the Union. \* \* \* The requirement is that the [employer] consult with the Union and explore in good faith the possibility of reaching an agreement so that, in conformity with the purposes of the Act, the matter may be removed, so far as it is possible, as a cause of industrial strife.

The Board did not elaborate on this analysis in its own opinion, but it did explicitly state that it approved

the trial examiner's ruling on the question of subcontracting (p. 504).

That was the state of the decisions in 1947 when Congress considered the scope of the duty to bargain collectively. There was a strong effort to define the subjects on which employers must bargain in such a way as to limit the scope of mandatory negotiations. The aim was plainly to prevent the further evolution of collective bargaining into areas not previously occupied. Such provisions were included in the House bill, as we pointed out at p. 21 above. The minority report of the House Labor Committee criticized the change upon the ground that it would impart rigidity where there should be flexibility and opportunities for growth; it specifically cited subcontracting as one of the subjects that should not be arbitrarily excluded from the scope of the statutory obligation.<sup>42</sup> The conference committee apparently acceded to this view for the changes proposed by the House were stricken from the Taft-Hartley Act.<sup>43</sup> If any inference is to be drawn from the sequence of events it is that Congress did not intend to foreclose adherence to the ruling in *Timken Roller Bearing Co.*

During the ensuing years there was a scattering of Board opinions and trial examiners' reports which gives some slight support to petitioner's argument. All except one of the cases is distinguishable, however, and none involved thorough consideration of the mat-

<sup>42</sup> Minority Report on H.R. 3020, 80th Cong., 1st Sess., p. 71, 1 Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948) 362.

<sup>43</sup> 93 Cong. Rec. 6443, 2 Leg. Hist. 1539.

ter now at issue. *Walter Holm & Co.*, 87 NLRB 1169, rests upon alternate grounds: first, that an employer may go out of business without negotiating with the union; second, that the union did not seek to bargain. *Krantz Wire & Mfg. Co.*, 97 NLRB 971, apparently rests upon the former ground alone, but there are differences between "going out of business" entirely and turning over part of the work in one's plant to the employees of a subcontractor instead of the employees in the bargaining unit. *Celanese Corp. of America*, 95 NLRB 664, appears from petitioner's statement to be an ordinary case of contracting out, but the Board's opinion shows that the contracting out was bringing in a contractor and its work force to do the work of the strikers in the same way that replacements may be hired—a step which is always taken without bargaining about the replacements with the union. Finally, it is true that the *National Gas Company* litigation (99 NLRB 273) was conducted on the assumption that the company's decision to contract out installation work was not a bargainable matter. Since everyone joined in that assumption, the case can hardly be regarded as a considered interpretation by the Board.

The argument that the decision in *Town & Country Mfg. Co., Inc.*, upset what had been settled Board doctrine for 27 years is belied by the expert commentary and continuous discussion of the question." The

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"Chamberlain, *The Union Challenge to Management Control* (Harper & Brothers, 1948), p. 326; Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 413-418; Fleming, "The Obligation to Bargain in Good Faith" in Shister, *Public Policy and Collective Bargaining* (Harper and Row, 1962), pp. 72-73;

most the record shows, we believe, is that, despite the strong declaration that subcontracting was bargainable in *Timken Roller Bearing Co.*, *supra*, the Board did not press the rule, perhaps because the question was not urgent or perhaps because the Board believed it would be unwise for a government agency to break new ground in collective bargaining practice before there were clearer indications of its importance in industrial life. Today, as we have shown, contracting out is, in fact, a major issue in labor-management relations and a widely accepted subject of collective bargaining, even though some employers continue to insist upon asserting a management prerogative.

The second objection to petitioner's argument is that the content of the words "terms and conditions of employment" cannot be confined to a specific list of topics by the course of administrative decision. The subject matter of collective bargaining today is not limited to the subjects upon which there was negotiation in 1935. The subjects of negotiation in the 1970's may well include topics about which there is no bargaining today. The contrary view was rejected by the course of history as well as the law when pensions, retirement, and health insurance became subjects of labor-management negotiations. See

*Inside vs. Outside*, 65 *Fortune* 215 (May 1962); Lieberman, *The Collective Labor Agreement* (Harper & Brothers, 1939), pp. 76-78; Slichter, *et al.*, *The Impact of Collective Bargaining on Management* (Brookings Institution, 1960), p. 282; Slichter, *Union Policies and Industrial Management* (Brookings Institution, 1941), pp. 437-441; Smith, *Collective Bargaining* (Prentice-Hall, 1946), pp. 186-187; *Collective Bargaining Provisions, Union and Management Functions, Rights and Responsibilities* (Bur. Lab. Stat. Bull. No. 908-912, 1949), pp. 20-26.

*Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247, 254 (C.A. 7), certiorari denied on this point, 336 U.S. 960.

The national labor policy, except for limited specific prohibitions, does not undertake to assign prerogatives to management or labor, nor does it specify a list of subjects of joint concern. It is concerned with the institutional framework and methods for resolving whatever conflicts of interest arise between labor and management out of the actual course of events, at least when they directly relate to tenure of employment. Events have made "contracting out" such an issue and have thus brought differences concerning it within the framework provided by the Act.

## II

PETITIONER VIOLATED ITS STATUTORY DUTY OF COLLECTIVE BARGAINING BY SUBSTITUTING A LABOR CONTRACTOR FOR THE EMPLOYEES IN THE BARGAINING UNIT WITHOUT PRIOR NEGOTIATION WITH THE UNION

The principle is well established that, in the absence of a contractual privilege or similar justification, unilateral action by an employer violates section 8(a)(5) if it is, in effect, a refusal to meet and negotiate with the employees' representatives about a statutory subject of collective bargaining. *National Labor Relations Board v. Katz*, 369 U.S. 736. Compare *Medo Corp. v. National Labor Relations Board*, 321 U.S. 678; *May Department Stores Co. v. National Labor Relations Board*, 326 U.S. 376; *National Labor Relations Board v. Crompton-Highland Mills*, 337 U.S. 217. Whatever may be the bearing of this principle

upon other cases (pp. 42-54 above), it plainly condemns petitioner's conduct.

Petitioner's conduct made it as plain as a flat refusal that petitioner would not negotiate with the Union about the abolition of the entire bargaining unit by substituting for the employees in the unit an outside firm hired to bring new employees into the plant and do the maintenance work under petitioner's ultimate direction.<sup>45</sup> The collective bargaining agreement had just been reopened. Negotiations for a new contract were impending. Although the Union made no request for negotiation in advance of the contracting out, because it had no warning that such a step would be taken, petitioner cannot have had the slightest doubt of the Union's interest in the bargaining unit or of its desire to negotiate about a measure that would deprive existing maintenance employees of their jobs and wipe out the Union's right of representation.

It is equally plain that petitioner is in no position to argue that the contract was let pursuant to an established mode of procedure. There is no evidence of prior contracts let in the same manner as recurrent steps in the normal conduct of the business and

<sup>45</sup> It could well be argued that petitioner's letter and statement on July 27, 1959, were themselves a flat refusal to negotiate. As the court below concluded (R. 174):

"The record clearly shows that the Company met with the Union to announce that it had decided to contract out the maintenance work, and that it would not bargain on this decision. This position was consistent with the Company's belief that contracting out was exclusively a "management prerogative" about which it could take unilateral action without first bargaining to impasse with the Union. \* \* \*"



accepted by all concerned as a management responsibility. On the contrary, contracting out the entire body of maintenance work, with the resulting discharge of a large part of the work force, is an abnormal measure, rarely adopted, as to which there could hardly be an accepted practice. Therefore, petitioner does not, and could not, defend its unilateral action as "a mere continuation of the status quo." Compare *National Labor Relations Board v. Katz*, 369 U.S. 736, 746.

Nor can it be argued that petitioner, facing the business necessity of an immediate decision, had no time for negotiation with the Union. There is no evidence of an emergency. An established firm would hardly decide to contract out all its plant maintenance without careful study. If any inference had to be drawn from the known facts, therefore, it would be that petitioner had been considering the step for some time but deliberately waited in silence until the expiration of the old agreement when it could present the Union with a *fait accompli* without risk of arbitration. It is enough to point out, however, that there is no evidence of pressure to act before there was an opportunity to bargain with the Union. Petitioner could have bargained if it wished. It preferred to assert a "prerogative."

That assertion was, under the circumstances, equivalent to an outright refusal to negotiate about the proposed "contracting out." Since the contract so affected terms and conditions of employment as to be a statutory subject of bargaining, petitioner thereby violated section 8(a)(5).



## III

THE BOARD DID NOT EXCEED ITS POWER TO FRAME A REMEDY BY DIRECTING PETITIONER TO RESUME ITS MAINTENANCE OPERATIONS AND REINSTATE ITS MAINTENANCE EMPLOYEES WITH BACK PAY

Upon finding that petitioner violated section 8(a) (5) by unilaterally substituting a labor contractor for the employees in the bargaining unit, the Board ordered petitioner to resume its maintenance operations, to reinstate the maintenance employees with back pay, and to bargain collectively with the Union (R. 19, 27). The order, we submit, was well within the remedial powers of the Board.

Section 10(c) empowers the Board, upon finding that an unfair labor practice has been committed, to issue an order requiring the violator to cease and desist and—

to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

In framing the remedy the Board has wide discretion. “[T]he relation of remedy to policy is peculiarly a matter for administrative competence \* \* \*.” *National Labor Relations Board v. Seven-Up Co.*, 344 U.S. 344, 349; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 194. The Board is to draw upon its experience with the practical workings of industrial relations as well as the need “of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment” (*id.* at 198). The Board’s order will stand “unless

it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*Virginia Electric Co. v. National Labor Relations Board*, 319 U.S. 533, 540).

No remedial principle is clearer than that restoration of the *status quo ante* tends to effectuate the policies of the Act. The rule has found a wide variety of applications.<sup>46</sup> Restoration of the *status quo pre-*

<sup>46</sup> See, e.g., *National Labor Relations Board v. Newport News Shipping & Dry Dock Co.*, 308 U.S. 241, 250 (disestablishment ordered of labor organization in whose formation employer unlawfully interfered); *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 361-366 (employer ordered to cease giving effect to individual contracts secured through unfair labor practices and to notify employees they were released from obligations imposed by those contracts); *Virginia Electric Co. v. National Labor Relations Board*, 319 U.S. 533, 538-544 (dues paid to employer-dominated labor organization ordered reimbursed to employees from whose wages they had been withheld under closed-shop, check-off arrangement); *ILGWU v. National Labor Relations Board*, 366 U.S. 731, 735, 736, 739-740 (employer ordered to withdraw recognition from union that lacked majority support when originally recognized and to cease giving effect to collective bargaining agreement executed with that union after it had secured majority); *Franks Brothers v. National Labor Relations Board*, 321 U.S. 702 (employer ordered to bargain with union, notwithstanding its loss of majority, where such loss was attributable to the employer's unfair labor practices); *National Labor Relations Board v. Talladega Cotton Factory*, 213 F. 2d 209, 216-217 (C.A. 5); *National Labor Relations Board v. Monkey Grip Co.*, 243 F. 2d 836 (C.A. 5), certiorari denied, 355 U.S. 864 (supervisors ordered reinstated with back pay, although not themselves accorded the protections of the Act, to remedy coercive effect of their discharges on rank-and-file employees); *National Labor Relations Board v. Gluek Brewing Co.*, 144 F. 2d 847, 856-857 (C.A. 8) (reinstatement ordered of brewing company employees whose delivery work had been transferred under pressure of union

vents the employer from gaining advantage by his unfair labor practice. Compare *Franks Bros. Co. v. National Labor Relations Board*, 321 U.S. 702, 705. It also secures employees freedom in the exercise of their statutory rights, by assuring them that the law, despite inevitable delays in enforcement, will put them as nearly as possible in the same situation as if the law had been obeyed.

That is the principle which the Board applied in the present case. For petitioner to reinstate the employees who lost their jobs, resume its own maintenance work, and then bargain with the Union, if it still desires to contract out the operation, will recreate as nearly as possible, the situation that would have existed if there had been no unfair labor practice.

It is argued that the order places an undue burden upon petitioner and interferes with its freedom to manage its own business by requiring it to resume operations that it wishes to abandon. The practical extent of the burden was for the Board to consider along with the adequacy of possible remedies such as

jurisdictional dispute to trucking company having contract with another union; order further required the discharge of trucking company employees performing this work, if necessary, and, if sufficient jobs were still not available for displaced brewing company employees, their placement on a preferential hiring list); *National Labor Relations Board v. Preston Feed Corp.*, 309 F. 2d 346, 351-352 (C.A. 4) (employer ordered to resume trucking operation whose discontinuance for economic reasons had been accelerated by antiunion considerations, and to reinstate with back pay employees displaced as a result of this action); *National Labor Relations Board v. Central Illinois Public Service Co.*, 324 F. 2d 916, 919 (C.A. 7) (employer ordered to restore gas discount which was discontinued without first bargaining with the union).

an order to negotiate about the resumption of maintenance work. Since petitioner is familiar with the problems of plant maintenance and is still having essentially the same kinds of maintenance work done in the same plant, still with its own equipment and under its own ultimate control, there would seem to be relatively little interference with the normal course of the company's business. The Board so found (R. 25). Against any burden on petitioner the Board had to weigh the difference to the employees between bargaining about the proposed abandonment of an operation in which they were actively engaged and negotiating as outsiders for the resumption of an operation which had been abandoned as far as they were concerned. The importance of the difference was for the Board to appraise out of its experience with industrial relations. Certainly, it was not unreasonable to conclude that the difference would have great practical importance to the actual conduct of the negotiations.

The interference, moreover, is purely temporary. The order leaves petitioner the same freedom to contract the work out after negotiating with the Union in good faith that it had before the unfair labor practice. Any pressure put upon petitioner by fear that its good faith may be suspect if the bargaining breaks down and it then contracts out the maintenance work was a factor for the Board to weigh along with other relevant considerations. The balance struck is not unreasonable.<sup>47</sup>

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<sup>47</sup> The Board has never automatically required an employer to resume the work "contracted out," but has tailored its order to the particular circumstances presented. In *The Renton News*

Such arguments as that the former employees' unwillingness to accept reinstatement will frustrate the effort to restore the *status quo* (Pet. Br. pp. 43-44), raise only questions of fact upon which the Board's conclusion is decisive.

*Record*, 136 NLRB 1294, the Board, although finding that the employers violated section 8(a)(5) by unilaterally contracting out their composing room operations, declined to order them to reinstate those operations and to bargain with the union about their discontinuance, on the ground that this would impose an inordinately heavy burden in view of "all" the factors present. The Board noted that: The employers "were faced with the choice of either changing their method of operation to one at least equal to that of their competitors, or being forced to go out of business. They selected the former alternative. The change adopted to accomplish their purpose involved a totally different process and required the participation of other weekly newspapers and an individual, none of [whom] is a party to this proceeding" (pp. 1297-1298). Similarly, in *Pepsi-Cola Bottling Company of Beckley, Inc.*, 145 NLRB No. 82, January 3, 1964, 55 LRRM 1051, the Board declined to order the employer to reopen its plant and reinstate the terminated employees, because he had arrived at his decision before the union had begun to organize the employees, the decision was attributable to unsatisfactory sanitary and other conditions at the plant, and the union had refused to withdraw its pickets long enough to permit the employer to correct those conditions (slip decision, p. 2). In *Winn-Dixie Stores, Inc.*, 147 NLRB No. 89, June 26, 1964, 56 LRRM 1266, the Board, although finding that the employer violated the Act by unilaterally discontinuing his cheese processing operation, did not order the reestablishment of that operation, in view of "the likelihood that the affected employees are suitable for employment elsewhere in the Respondent's organization, and the possibility that the discontinued operation may now be outmoded" (slip decision, p. 5). The Board ordered the employer to bargain with the union about the resumption of the operation, and added a requirement "that the employees whose statutory rights were invaded by reason of the Respondent's unlawful unilateral action, and who may have suffered losses in consequence thereof, be reimbursed for such losses until such time as the Respondent remedies its

Petitioner's attack upon the order of reinstatement also lacks merit. Nothing in section 10(c) limits the Board's power to order reinstatement to cases involving violation of section 8(a)(3). Nor is it the whole truth for petitioner to say that this is "the first instance in the history of the Act in which the Board has ordered reinstatement in a case involving only a refusal to bargain" (Pet. Br. 39-40). There are innumerable cases in which an unfair refusal to bargain resulted in a strike and the Board ordered reinstatement of the strikers, even though their jobs had been filled, as a remedy for the violation of section 8(a)(5). Technically the Board also alleged violations of sections 8(a)(1) and 8(a)(3), but the thrust of the orders,

violation by doing what it should have done in the first place" (slip decision, p. 6). In *Fairbanks Dairy, Division of Cooperdale Dairy Company*, 146 NLRB No. 111, April 17, 1964, 55 LRRM 1437, the Board, though finding that the employer violated the Act by entering into a lease arrangement which converted some of his drivers into independent contractors without first bargaining with the union, did not order a restoration of the *status quo* pending future bargaining because "no employee's connection with the Respondent [except one] was severed as a result of Respondent's unlawful action," "all three individuals, as lessees, have made significant investments in their business and have undertaken financial obligations," and two of the individuals "now claim to earn much more money than they did as employees" (trial examiner's decision, p. 13). And, in *Royal Plating and Polishing Co.*, 148 NLRB No. 59, August 27, 1964, 57 LRRM 1006, the Board, on finding that respondent had violated section 8(a)(5) by withholding from the union in contract negotiations that it had arranged to sell the premises to the city housing authority, did not order respondent to resume the operation but merely to pay the employees what they lost in wages during the seven-month period between the unlawful refusal to bargain and the date when respondent was required to vacate the premises under its agreement with the housing authority.



in many instances, was to restore the *status quo ante* the refusal to bargain by reinstating the unfair labor practice strikers and ordering negotiations.<sup>48</sup>

Even more frivolous is the claim that the Board had no power to order reinstatement because the employees were discharged for cause within the meaning of the penultimate sentence of section 10(c) (Pet. Br. 40-42). The passages quoted by petitioner from the opinion in *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, and Senator Taft's remarks during the Taft-Hartley debate, plainly refer to the typical case under section 8(a) (3), in which the Board must decide whether an employee was discharged for misconduct or union activities. But, it does not follow that, just because an employee is not discharged for union activity, that the discharge is "for cause." If, as here, the discharge flows from conduct which constitutes an unfair labor practice, the discharge cannot be "for cause" within the meaning of section 10(c). Petitioner's interpretation would, for example, upset the settled practice of ordering the reinstatement of unfair labor practice strikers whose positions have been filled by

<sup>48</sup> See, e.g., *National Labor Relations Board v. Dell (Waycross Machine Shop)*, 283 F. 2d 733, 740-741 (C.A. 5); *National Labor Relations Board v. Rutter-Rex Mfg. Co.*, 245 F. 2d 594, 598 (C.A. 5); *National Labor Relations Board v. Efco Mfg., Inc.*, 227 F. 2d 675, 676 (C.A. 1), certiorari denied, 350 U.S. 1007; *National Labor Relations Board v. Peckeur Lozenge Co.*, 209 F. 393, 404-405 (C.A. 2), certiorari denied, 347 U.S. 953; *Wheatland Electric Corp. v. National Labor Relations Board*, 208 F. 2d 878, 883 (C.A. 10), certiorari denied, 347 U.S. 966. Cf. *Piasecki Aircraft Corp. v. National Labor Relations Board*, 280 F. 2d 575, 591-592 (C.A. 3), certiorari denied, 364 U.S. 933.

replacements.<sup>49</sup> Manifestly, Congress had no such intention.<sup>50</sup>

#### CONCLUSION

For the reasons stated the judgment of the court below should be affirmed.

Respectfully submitted.

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SEPTEMBER 1964.

<sup>49</sup> *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 278, and cases there cited at n. 9; *National Labor Relations Board v. Buitioni Foods Corp.*, 298 F. 2d 160, 175 (C.A. 3); *National Labor Relations Board v. West Coast Casket Co., Inc.*, 205 F. 2d 902, 908 (C.A. 9). See, also, *National Labor Relations Board v. Erie Resitor Corp.*, 373 U.S. 221, 226, n. 5, enforcement granted on remand *sub. nom. Erie Technological Products, Inc. v. National Labor Relations Board*, 328 F. 2d 723, 726 (C.A. 3).

<sup>50</sup> The background of the provision in question is discussed in Cox, *Some Aspects of the Labor-Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 20-22. The discussion seems incomplete insofar as it fails to note the possible application of the provision where reinstatement would be the normal remedy but the employer asserts that the employee has subsequently been discharged for misconduct. See, e.g., *National Labor Relations Board v. Thayer Co.*, 213 F. 2d 748, 753 (C.A. 1), certiorari denied 348 U.S. 883. Those questions, however, are not involved in the present case.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*) are as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer—

\* \* \* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

\* \* \* \* \*

(b) It shall be an unfair labor practice for a labor organization or its agents—

\* \* \* \* \*

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

\* \* \* \* \*

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or

modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who

engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

\* \* \* \*

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

\* \* \* \*

Sec. 10. \* \* \*

(c) \* \* \* If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: \* \* \*

Office Supreme Court, U.S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

**Supreme Court of the United States.**

OCTOBER TERM, 1964

FIBREBOARD PAPER PRODUCTS CORPORATION

*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
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BRIEF FOR THE UNITED STEELWORKERS OF  
AMERICA AND ITS AFFILIATED LOCAL UNION  
1304, EAST BAY UNION OF MACHINISTS

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1964

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No. 14

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FIBREBOARD PAPER PRODUCTS CORPORATION

*Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

BRIEF FOR THE UNITED STEELWORKERS OF  
AMERICA AND ITS AFFILIATED LOCAL UNION  
1304, EAST BAY UNION OF MACHINISTS

---

STATEMENT OF THE CASE

Since the Petitioner's Brief contains only a sketchy statement of the facts of this case, we will restate them here in somewhat more detail.

1. *The Events Preceding Contracting Out*

The United Steelworkers of America, AFL-CIO, together with its affiliated Local Union 1304, East Bay Union of Machinists (hereinafter jointly referred to as the Union), was, until the events of this case, the exclusive bargaining representative of a unit of maintenance employees of Fibreboard Paper Products Corporation (hereinafter referred to

as the Company) at its Emeryville, California plant. The unit consisted of maintenance mechanics and machinists, their helpers, working foremen, firemen and engineers in the powerhouse, and a storekeeper in the central supply and store room. (R. 46)

In 1959, there was in effect between the parties a collective bargaining agreement, which provided that either party could seek to terminate or modify the agreement by sending 60 days' written notice prior to July 31, 1959. It further provided that any party sending such a notice must, within 15 days thereafter, submit to the other party "a complete and full list of all proposed modifications," and that "negotiations shall commence no later than forty-five (45) days prior" to July 31. (R. 47).

Pursuant to this provision, the Union, on May 26, 1959, notified the Company of its desire to modify the agreement. The Company, in a letter dated June 2, acknowledged receipt of the Union's notice and stated that "we will contact you at a later date regarding a meeting for this purpose." (R. 153)

On June 15, in accordance with the agreement, the Union sent the Company its list of proposed modifications of the agreement. (R. 153-55)

Despite its statement that it would do so, the Company did not contact the Union to set a meeting date. The Union made several efforts to schedule a meeting, all of which were unsuccessful. (R. 49)

The reason for the Company's evasion of the Union soon became apparent. After receiving the Union's contract demands, the Company began to update certain studies—which had been initiated sometime earlier and then abandoned—to determine whether its maintenance work could be performed at lower cost by using the employees of an independent contractor. As a result of these studies, the Company concluded that it could save a substantial sum of money by terminating all of the employees represented by



the Union, and engaging a contractor to perform their work. (R. 57-58)

At no time during the period that the Company was making these studies did it inform the Union that it was considering contracting out its maintenance work. Finally, on July 27, just four days before the July 31 deadline, the Company's director of Industrial Relations, Mr. Thumann, arranged a meeting with the Union's chief representatives for that evening. At that meeting, Thumann gave the Union representatives a letter announcing that Fibreboard had "reached a definite decision" to contract out its maintenance work effective August 1, 1959, and that "negotiations for a new contract would be pointless." (R. 155-56)

Mr. Thumann then proceeded to describe the "termination" benefits which Fibreboard intended to provide the employees who would be displaced. He stated that a contractor had not yet been chosen, but that he would inform the Union when that decision was made. The meeting concluded with the understanding that the parties would meet again on June 30.

The next day, Mr. Thumann notified the Union that the contract had been awarded to Fluor Maintenance, Inc. (R. 51).

On July 29, the Union wrote a letter to the Company in which it asserted that there was still an agreement in effect between the parties, that the Company had not given any 60-day notice of its desire to cancel that agreement, and that according to its terms the agreement would remain in effect for another year, subject only to the Company's duty to bargain with respect to the modifications proposed by the Union (R. 51).

On July 30, a meeting between the Union's negotiating committee and a Company committee took place. At the beginning of that meeting, Mr. Thumann handed the Union committee a letter responding to the Union's letter of the previous day. In it, the Company took the position that the

agreement would automatically expire on July 31, that the agreement did not in any event prohibit the contracting out of work, and that "since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless" (R. 52-53). The Union committee then stated that it wished to negotiate with respect to its proposed modifications of the agreement, but the Company adhered to its position that this would be "pointless" (R. 84).

When asked to explain the reasons for its decision, Mr. Thumann stated that he had on several occasions in the past explained to the Union, with the aid of charts and statistics, "just how expensive and how costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant." He also stated that "other unions on that property had joined hands with management in an effort to bring about an economical and efficient operation" and that "we had not been able to attain that in our discussions with this particular Local" (R. 85).

In reply to a proposal that the Company arrange to have members of the Union perform the maintenance work as employees of the contractor, Mr. Thumann stated, "that could not be done as we had entered into this contracting of maintenance work for economy and efficiency of operation, and for us to tie the contractor's hands in any fashion, shape, or form would be senseless" (R. 89). He did suggest, however, that the former Fibreboard employees could apply individually for employment with Fluor. He said that he had informed Fluor that "we have some very capable maintenance people in all crafts," and that Fluor had indicated that it was willing to consider hiring former Fibreboard employees (R. 88).

At the conclusion of the meeting, Mr. Thumann wrote on the attendance sheet, next to the names of the management representatives:

"These representatives of Fibreboard are not in attendance for Contract Negotiations but to restate their opinion that negotiations for a new contract would be pointless in view of management's intention to contract out powerhouse and maintenance work" (R. 159, 89).

On July 31, each maintenance employee was given a notice of termination (R. 56). Since that time, the maintenance work has been performed by the employees of Fluor Maintenance, Inc.

## *2. The Nature of the Contracting Out*

In view of the nature of the argument made by Petitioner, and the *amici*, it is important to emphasize exactly what the "contracting out" in this case actually was.

The work which the Company "contracted out" was the maintenance of its production equipment and the operation of its power plant. This work, of course, had to be performed so long as the Company continued its manufacturing operations. And it had to be performed at the plant site; it could not be sent out for performance at another location. Nor did Fluor have any advanced equipment with which to perform the work more efficiently than Fibreboard. Indeed, the work was to be performed with Fibreboard's tools and equipment, and under Fibreboard's general supervision.

In short, the sole effect of the contracting out arrangement was that Fibreboard's work was to be performed on Fibreboard's premises in the same way, and with the same equipment, as before—but by Fluor's employees instead of Fibreboard's employees.

This is fully demonstrated by two documents in the record: Fluor's formal proposal to Fibreboard (R. 139) and the actual contract which was executed August 4 (R. 163). These documents show that Fluor's role was essentially that of a labor broker. It undertook only one basic obligation: to "furnish all labor, supervision, and office help required for

the performance of maintenance work, operation of the boiler plant, and minor alteration and minor construction work . . . as Owner shall from time to time assign to contractor . . ." (R. 160). Fluor also agreed to furnish, at Fibreboard's expense, such tools, supplies and equipment as Fibreboard ordered, "it being understood, however," that Fibreboard "shall ordinarily do its own purchasing of tools, supplies and equipment" (R. 160).

Fibreboard agreed to reimburse all of Fluor's costs, including wages, fringe benefits, payroll taxes, travel and subsistence expenses, utilities, telephone, telegraph, stationery, Workmen's Compensation insurance, permits, licenses, fees, and such tools and equipment as Fibreboard did not furnish. In addition, Fibreboard agreed to pay Fluor a fixed fee of \$2250 per month (\$27,000 per year) (R. 161-62). The contract was terminable by Fibreboard at any time upon sixty days' written notice (R. 160).

Fluor made clear in its proposal that its personnel would work entirely under the direction of Fibreboard's management. Thus, it stated:

"We propose that our day-to-day operations will be a functioning component of your organization, subject to your over-all direction. Further, we propose that the inspection of our work completions would be under the direction of Fibreboard" (R. 145).

It also stated:

"Our superintendent will, in all practical purposes, report to Fibreboard plant management. He will become an integral part of your operating organization and will work energetically and cooperatively toward accomplishing your management orders and objectives" (R. 141).

Finally, it stated:

"Our recommendations for supervisors are always submitted to your management for consideration and

appraisal of their background of experience and qualifications before any assignments are made. The number of supervisors and office overhead is always under your direct control and subject to your approval in accordance with the assigned work load. This force is quite flexible and subject to modification to meet the day-to-day efficiency requirements" (R. 140-41).

The question naturally arises, if Fluor was to do the same work with the same equipment as Fibreboard's employees, what was the source of the saving which Fibreboard hoped to gain from this arrangement? The answer is that Fluor's employees were willing to work at less costly terms and conditions of employment than had been negotiated between Fibreboard and its own employees.

Fluor, in its proposal, emphasized the advantageous relationships it had with certain labor organizations, and tendered to Fibreboard a sample of the type of labor contract which it had negotiated elsewhere, and which it had been assured of obtaining for Fibreboard as well. It pointed out in detail the advantages which such an agreement would provide:

"This type of labor contract makes available the skilled craftsmen who are familiar with maintenance and construction work but eliminates many of the labor problems when owners perform maintenance with their own crews or with subcontractors who use Building Trades working conditions. Examples of benefits in this type of proposed contract are:

"Elimination of most of the fringe benefits, such as travel time, subsistence, vacation pay, sick leave, termination pay, paid holidays, etc.

"We retain the right of complete selection and determination of a craftsman's ability and production.

"Right to terminate employees or reduce work forces at any time.

"Mixed crew assignments with considerable jurisdictional assignment latitude.

"Elimination of any work quotas or work slowdown methods.

"Maximum utilization of man-hour savings, tools or equipment.

"Right to enforce high rates of production from all maintenance employees" (R. 146-47).

Fluor also stated that "labor has assured us of a cooperative endeavor that will give us greater production through our labor forces which will result in giving Fibreboard a lower cost on their maintenance work" (R. 147).

When the Company states that it contracted out its maintenance work for "economic" reasons, these are the considerations it is referring to.

### *3. The Proceedings Below*

Upon charges filed by the Union, the NLRB's Regional Director issued a complaint alleging that the Company, by its action, had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act (R. 5). The matter was heard before Trial Examiner Howard Myers, who, on November 27, 1959, issued an Intermediate Report and Recommended Order, recommending that the complaint be dismissed. (R. 44).

On March 27, 1961, the Board issued its first Decision and Order (R. 35), in which it affirmed the decision of the Trial Examiner and dismissed the complaint. On the question of whether the Company had a duty to bargain with the Union concerning its decision to terminate the employees and contract out their work, the Board held that the termination of employment is not, in itself, a matter for bargaining. The Board reasoned that an employer is required to bargain as to which employees shall be selected for termination, or what benefits employees will receive upon termination, but not as to whether or not employees will be



terminated. The Board conceded that there were cases holding that there is a duty to bargain with respect to the elimination of jobs, but concluded that that duty exists only where such action has an effect on employment conditions of employees remaining in the unit, not when all the jobs in the unit are to be eliminated.

In other words, the Board's original decision held that an employer must bargain with the representative of his employees when he proposes to contract out *part* of a bargaining unit, but not when he proposes, as here, to contract out the work of an *entire* bargaining unit.

Member Fanning wrote a dissenting opinion (R. 39) which rejected this distinction, and expressed the view that the termination of employees and elimination of jobs is a subject with respect to which an employer is always required to bargain.

Both the Union and the Board's General Counsel petitioned for a reconsideration of the decision. In September, 1962, the Board issued its Supplemental Decision and Order (R. 19), in which it reconsidered that portion of its original decision dealing with the Company's alleged violation of the statutory duty to bargain, and held that the Company had violated that duty by terminating its maintenance employees, and contracting out their work, without prior bargaining with the Union. The Board relied on its intervening decision in *Town & Country Mfg. Co.* 136 N.L.R.B. 1022 (1962), in which it had held that the contracting out of work is a matter with respect to which employers are required to bargain, as well as this Court's decision in *Order of R. R. Telegraphers v. Chicago & N. W. R. R.*, 362 U. S. 330 (1960).

Member Rogers dissented (R. 28), adhering to the views expressed in the Board's original decision.

In fashioning a remedy for Fibreboard's refusal to bargain, the Board noted that it would be futile simply to order the Company to bargain about a *fait accompli*. Accord-

ingly, it ordered the Company to resume its maintenance operations, reinstate the ousted employees, and bargain with the Union. It further ordered the Company to make the employees whole for their loss of earnings, but only for the period commencing with the date of the Supplemental Decision and Order (R. 25).

Both the Union and the Company filed petitions for review in the District of Columbia Circuit, each seeking review of those portions of the decision unfavorable to it. The Board cross-petitioned for enforcement of its order. The Court affirmed the Board's decision, and enforced the order (R. 171, 179). Timely petitions for rehearing were denied.

Both the Company and the Union filed petitions for certiorari in this Court. The Union's petition was denied, *East Bay Union of Machinists v. NLRB*, 375 U. S. 974 (1964) but the Company's petition was granted in part (R. 183-84), presumably because of the conflict between the decision below and the decision of the Eighth Circuit in *NLRB v. Adams Dairy, Inc.*, 322 F. 2d 553 (1963).

## SUMMARY OF ARGUMENT

### I

A. Reduced to its bare essentials, the question in this case is whether an employer who believes that the labor costs under his collective bargaining agreement are too high is required to try to solve his problem by bargaining with his employees' union, or whether he may solve it unilaterally by waiting until, in his view, the existing collective bargaining agreement expires and then simply terminating the employees and engaging a contractor whose employees are willing to do the same work under less costly terms and conditions of employment.

Thus put, the question almost answers itself. The purpose of the National Labor Relations Act is to foster collective bargaining as a method by which the interest of em-

ployees in maximum pay and security and good working conditions, and the interest of employers in minimum costs and maximum profits, can be accommodated in a manner which gives recognition and expression to both interests. By imposing its own solution unilaterally, the Company has circumvented the collective bargaining process. The result, of course, is that the solution it adopted took care of the Company's problem without taking account of, or making provision for, the interests of the employees.

It is at least possible that collective bargaining might have provided a mutually satisfactory solution that would have spared the employees their jobs. At the very least, the Act requires that an effort be made to find such a solution before the employer may take unilateral action.

The fact that the contracting out in this case was simply a device for changing the terms and conditions of employment under which the maintenance work was to be performed demonstrates, in a particularly dramatic fashion, the manner in which the policies of the Act may be thwarted if the Company's argument that contracting out is not a matter for bargaining were sustained. But in the last analysis, the chief reason why contracting out is a matter about which bargaining is required is that when an employer contracts out work, he thereby reduces the number of jobs or the amount of work available to employees in the bargaining unit. And the matter of what work, or what jobs, will be available to employees is plainly one of their "terms and conditions of employment" within the meaning of the Act.

This Court has already held, in *Order of Ry. Telegraphers v. Chicago & N.W.R.R.*, 362 U. S. 330 (1960), that the question of whether or in what circumstances jobs may be eliminated is a matter "concerning terms and conditions of employment" within the meaning of the Norris-LaGuardia Act, and a matter within the area of "rates of pay, rules, and working conditions" about which bargaining is required by the Railway Labor Act. There is no basis for reaching any

different result under the essentially similar phrase, "terms and conditions of employment," as used in the National Labor Relations Act.

Bargaining about such matters is common throughout industry. Indeed, in this age of rapid technological change and chronic unemployment, the preservation of jobs and the promotion of job security have become a primary objective of most unions. If collective bargaining is to perform its function of reconciling the conflicting interests and needs of labor and management, it is essential that the Act be construed to require bargaining about contracting out or other employer actions directly affecting the amount of work, or the number of jobs, available to employees.

B. Contrary to the arguments of the Company and the *amici*, the decision in this case is not contrary to, but is consistent with, prior decisions of the Board and the courts, including this Court.

As early as 1941, the Board held that it was a violation of the duty to bargain for an employer unilaterally to transfer work from one plant to another—an action essentially similar to contracting out—without first bargaining with his employees' bargaining representative. There have been several subsequent cases reaching the same result.

In 1946, the Board specifically held that an employer must bargain about the contracting out of bargaining unit work. That decision, too, was followed in several subsequent cases.

Most of the decisions which the Company relies on as precedent involved questions entirely different from that presented here. Only two of them seem to look in the opposite direction from that taken by the Board in the present case, and those two dealt primarily with other issues, and treated in only the most cursory manner the question of whether an employer must bargain before contracting work out, or terminating his operations. To the extent that those two cases are in conflict with the decision in the present case, they are also in conflict with all the other Board precedents,

as well as this Court's decision in the *Telegraphers* case.

This Court's decision in *Local 24, Int'l Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 (1959), 362 U. S. 605 (1960) is also relevant. In that case, the Court held that a collective bargaining agreement restricting the right of certain employers to contract out work could not be invalidated by a state antitrust law, because it dealt with a subject matter about which the parties were required to bargain by the National Labor Relations Act.

C. The decision in this case is not only in accord with established precedent, it is in accord with collective bargaining practice. Bargaining about contractual standards to govern the contracting out of work is a matter of routine throughout American industry. As of 1959, according to a Labor Department study, some 378 of the 1687 collective bargaining agreements covering 1,000 or more workers contained some express restriction on contracting out. And the absence of such an express provision in other agreements, of course, does not indicate that the parties had not bargained about contracting out, but only that they had not agreed on a contractual provision dealing with it. In the basic steel industry, for example, the union has tried for years to obtain an express restriction on contracting out, but not until 1963 was such a provision actually negotiated.

In addition, contracting out has been the subject of many grievances. There are more than 100 published arbitration awards dealing with such grievances, and most of them hold that even in the absence of any express language in the agreement, the very existence of a collective bargaining agreement limits to some extent management's right to eliminate jobs covered by the agreement by contracting work out.

D. The argument of the Company and the *amici* that to require employers to bargain about contracting out would impose an unreasonable burden on management is without merit. It is based primarily on the false assumption that

the only way the duty could be discharged is by bargaining on an *ad hoc*, case-by-case basis each time work is to be contracted out. While this is one way of handling the matter, any employer who considers that approach impractical is free to negotiate a general contractual provision governing contracting out. As we have indicated, such provisions are common, and where they exist, management is free to contract out work without prior bargaining, subject only to its contractual obligation to comply with the agreement. Indeed, an employer who believes that it is absolutely essential for the efficient conduct of his business to be free of all restrictions on contracting out may insist on a contractual provision giving him the right to contract out work as the price of a collective bargaining agreement.

And even in the absence of either an express or implied agreement on the principles to govern contracting out, an employer need not bargain whenever work is to be contracted out. The question in every case is whether the employer's action constitutes a change in terms and conditions of employment—*i.e.*, a change in the status quo. If an employer has as a matter of practice contracted out certain types of work in certain circumstances, then that practice is the existing condition of employment, and bargaining is not required each time action is taken which is in accord with that practice.

Nor does the decision in this case imply that employers must bargain about every management decision which may remotely affect employees, or the amount of work in the bargaining unit. The price of an employer's product may ultimately affect the volume of business he will do, and thus the amount of work his employees have, but the decision to raise or lower prices is not a decision to increase or decrease the amount of work available to employees. On the other hand, a decision to contract work out is a decision to take work from employees, and is therefore subject to the duty to bargain.



E. Section 8(e) has no bearing on this case. As the legislative history makes clear, it was intended, like the almost identical language in Section 8(b)(4)(B); to deal with secondary boycotts.

## II

The Board's remedial order in this case, requiring the Company to resume its maintenance operations and reinstate employees with partial back pay, is valid and proper. The Act gives the Board broad discretion to require an employer who has committed an unfair labor practice to "take such affirmative action, including reinstatement of an employee, with or without back pay, as will effectuate the policies of the Act." The Board's customary policy in cases involving unilateral changes in terms and conditions of employment has been to require the employer to reinstate the *status quo ante*, and to make employees whole for any financial loss which resulted from the unilateral action. The Board's order in this case is simply an application of that policy.

The ideal remedy, of course, would be to create the situation which would have resulted from bargaining, had the employer bargained. Since there is no way of knowing what that situation would have been, however, the only feasible thing to do is to put the parties back in the position they were in originally, and then let bargaining take its course.

It cannot be assumed that bargaining would have resulted in an impasse, and that the employer would ultimately have contracted out the work in any event. The entire Act is based on the premise that collective bargaining is not a fruitless ritual, but rather is a process through which labor and management can work out mutually acceptable solutions to their common problems.

The likelihood that bargaining would have produced a solution is particularly great in this case, since the sole reason

for the contracting out was the Company's view that the existing terms and conditions of employment were too costly. This is precisely the kind of problem which can be resolved through collective bargaining.

The fact that restoration of the status quo may involve some inconvenience, trouble and expense to the Company argues for, rather than against, the Board's order. If the Board simply ordered bargaining, the Union would have the task of persuading the Company to undertake this inconvenience, trouble and expense. This would make the job of working out a mutually agreeable solution immeasurably more difficult. Indeed, that is a principal reason why employers are required to bargain before making changes in terms and conditions of employment. Obviously, any effective remedy for the violation in this case would have to eliminate the cost and inconvenience of restoring the status quo as a factor to be considered in the bargaining.

The fact that a remedy may be costly does not make it punitive. A remedy is punitive only if it imposes a burden which cannot be justified as necessary or proper to effectuate the purposes of the Act.

The provision in Section 10(c) of the Act prohibiting reinstatement of employees who have been discharged for cause, on which the Company relies, is not applicable here. That provision was designed to prevent the Board from reinstating employees who had been discharged for misconduct, even where the misconduct was connected with union activities. In this case, the employees plainly were not discharged for misconduct. As the Board held, their "loss of employment stemmed directly from their employer's unlawful action in bypassing their bargaining agent." The Board's order is thus well within its statutory authority to provide a remedy which will effectuate the policies of the Act.

## ARGUMENT

### **I. THE COMPANY VIOLATED SECTION 8(a)(5) WHEN IT TERMINATED ALL OF THE EMPLOYEES IN THE BARGAINING UNIT AND CONTRACTED OUT THEIR WORK WITHOUT BARGAINING WITH THE UNION.**

#### ***A. Both the Language and the Purpose of the Act Compel the Conclusion That Contracting Out Is a Matter Subject to the Duty to Bargain.***

Reduced to its bare essentials, this case presents the following problem. An employer, who believes that the labor costs under his collective bargaining agreement are too high, is confronted with new bargaining demands by the union representing his employees which would result in even higher costs. Instead of attempting to solve this problem through collective bargaining, the employer seeks out a contractor who has available a group of employees willing to work under less costly terms and conditions than the employer's own employees. The contractor offers the employer a cost-plus contract, under which the contractor would perform the work with his own employees, but with the employer's tools and equipment and under the employer's direction. May the employer, in these circumstances, wait until, in his view,<sup>1</sup> the existing agreement with the union expires and then, without bargaining, terminate his own employees, and engage the contractor to perform their work? Or must he first attempt to solve his labor cost problem through the processes of collective bargaining, and not take unilateral action unless the bargaining results in an impasse?

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<sup>1</sup>The question of whether the contract expired, or whether it remained in effect subject to modification in accordance with the Union's reopening notice, is now being litigated in an action brought by the Union in the United States District Court for the Northern District of California. A motion to dismiss the complaint has been denied, and an interlocutory appeal is pending in the Ninth Circuit.

Thus put, the question almost answers itself. In substance, if not in form, the Company has simply changed the terms and conditions of employment under which its maintenance work will be performed. The Act, of course, prohibits an employer from making such changes directly without bargaining with his employees' union. *NLRB v. Katz*, 369 U. S. 736 (1962). And if the purposes of the Act are to be carried out, the necessity for bargaining is just as great when the employer accomplishes the same result indirectly, through the device of contracting the work out.

The fundamental purpose of the Act, after all, is to foster collective bargaining as a method by which the interest of employees in maximum pay and security and good working conditions, and the interest of employers in maximum profits and minimum costs, can be accommodated in a manner which gives recognition and expression to both interests. By contracting out the maintenance work without bargaining, the employer has totally evaded the collective bargaining process which the Act established for the precise purpose of dealing with the type of problem which this case involved. And in so doing, of course, the Company solved its problem in a manner which utterly failed to take account of, or make provision for, the *employees'* interest.

If the Company, before taking action, had attempted to resolve its problem through collective bargaining, it is at least possible that an agreement might have been reached which would have obviated the necessity of contracting out the work, and thus spared the employees' jobs. Surely, for example, Fibreboard would not have contracted out the work if the Union had been willing to agree to terms and conditions of employment as favorable to management as those which Fluor's employees were willing to accept. There is, of course, no way of knowing whether a mutually acceptable solution would have been found. But the Act requires, at the very least, that the Company make the effort to find one before imposing its own solution unilaterally.

We do not mean to suggest that the Company's obligation to bargain in this case arose solely because the contracting out involved here happened to be simply a device for changing the terms and conditions of employment under which the maintenance work was to be performed. Rather, we emphasize this fact because we believe it demonstrates, in a particularly dramatic way, the manner in which the policies and purposes of the Act would be thwarted if the Company's argument, that contracting out is not a subject about which employers must bargain, is sustained. In the final analysis, however, the fact that contracting out may be used to undermine labor standards is only one reason, and perhaps not even the most important reason, why it must be subject to the statutory duty to bargain.

The main reason why employers are required to bargain about contracting out is, quite simply, that whenever bargaining unit work is contracted out, the number of jobs which otherwise would be available to employees in the bargaining unit is reduced. And the matter of what jobs or what work will be available to employees is plainly a matter within the area of "terms and conditions of employment" about which the Act requires bargaining.

The Company and the *amici* argue, in effect, that the statutory phrase "terms and conditions of employment" refers only to the terms and conditions under which work is to be performed, and not what work, or what jobs, the employer will make available to employees. Simply as a matter of interpreting the words of the statute, this is hardly a tenable argument. What work employees will be required to do, or what jobs will be provided to them, surely is one term or condition of their employment. And whatever doubt might otherwise exist on this question is removed by this Court's decision in *Order of Ry. Telegraphers v. Chicago & N.W.R.R.*, 362 U. S. 330 (1960).

In the *Telegraphers* case the railroad had requested permission from certain state public utilities commissions to dis-

continue a number of its stations. The union, which represented station agents, responded by proposing a contract clause which would state that no job "will be abolished or discontinued except by agreement between the carrier and the organization," and threatened to strike in support of this demand. The Seventh Circuit had directed that the strike be enjoined, on the ground that the union's proposal "is completely outside the ambit of 'rates of pay, rules or working conditions,' as those words are used in the Railway Labor Act." 264 F. 2d 254, 260. On that basis, the court concluded that the Norris-LaGuardia Act did not preclude the issuance of an injunction against the strike.

This Court reversed the Seventh Circuit. It held, first, that the strike could not be enjoined because it involved a "labor dispute" within the meaning of Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113(c), which defines a labor dispute as "any controversy concerning terms and conditions of employment." The Court stated:

"Unless the literal language of this definition is to be ignored, it squarely covers this controversy. . . .

"Plainly the controversy here relates to an effort on the part of the union to change the 'terms' of an existing collective bargaining agreement. The change desired just as plainly referred to 'conditions of employment' of the railroad's employees who are represented by the union. The employment of many of these station agents inescapably hangs on the number of railroad stations that will be either completely abandoned or consolidated with other stations. And, in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment. The District Court's finding that 'collective bargaining as to the length or term of employment is commonplace,' is not challenged." *Id.* at 335-36.

In addition, the Court held that the union's demand was



not unlawful, but rather was a legitimate subject for collective bargaining under Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First, which requires bargaining with respect to "rates of pay, rules, and working conditions."

"Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules, and working conditions.' " *Id* at 339.

The Company attempts to distinguish this decision on the ground that it did not involve the National Labor Relations Act. It can hardly be contended, however, that the phrase "terms and conditions of employment," as used in that Act, has a different meaning than the phrase "terms or conditions of employment," in Norris-LaGuardia or the phrase "rates of pay, rules, and working conditions" in the Railway Labor Act.

In recent years, the question of whether, or in what circumstances, jobs may be eliminated has been one of the most prominent issues in labor-management negotiations. The recent national railroad dispute over the elimination of the job of fireman nearly caused a national crisis, and ultimately was settled only by special legislation. In 1959, a major issue in the 116-day strike in the steel industry was management's demand that it be given greater freedom to eliminate jobs by reducing the sizes of crews in the steel mills. Recent labor disputes in the longshore industry have centered on the question of management's right to introduce automated equipment and thereby eliminate jobs. In the construction industry, so-called "jurisdictional" disputes over what work will be given to what crafts are in fact almost always disputes over which employer shall perform particular work, since the work of each craft is typically performed by a separate employer. And, as we shall show more

fully below, bargaining on the question of whether or in what circumstances management may contract out bargaining unit work is common throughout most of American industry.

If the position of the Company and the *amici* in this case were sustained, it would mean not only that employers could, at any time, unilaterally eliminate some or all of their employees' jobs, by contracting out their work or by other means. It would also mean that employers could lawfully refuse even to discuss with their employees' bargaining representatives any proposed agreement which would give employees a measure of job security by restricting management's right to contract out their work, or otherwise eliminate their jobs. It would mean, indeed, that any union which called a strike in support of such a proposal would be guilty of an unfair labor practice itself. *Cf. NLRB v. Wooster Div., Borg Warner Corp.*, 356 U. S. 342 (1958); *Local 164, Brotherhood of Painters v. NLRB*, 293 F. 2d 133 (D. C. Cir 1961)

Any such result would run directly counter to the purposes and policies of the Act. In this era of rapid technological change and chronic unemployment, one of the principal concerns of employees is job security. At one time in our history, the main goal of unions may have been solely to obtain higher pay, better hours, and more humane working conditions, although we doubt it. But, in any case, in today's society, although these goals still exist, a primary objective of most American unions is to obtain greater job security for the employees whom they represent. Workers today are at least as concerned with keeping their jobs as they are with the hours that they work or the pay they receive. In the words of this Court in the *Telegraphers* case, "in the collective bargaining world today, there is nothing strange about agreements that affect the permanency of employment." 362 U. S. at 336. If collective bargaining is to serve its purpose of reconciling the conflicting needs and interests of labor and management, therefore, the Act

must be construed to require bargaining on such matters as what work employees will perform, what jobs will be available to them, and under what circumstances work may be withdrawn or jobs eliminated from the bargaining unit. Since contracting out is one way in which work is taken from employees, it must be one of the subjects about which bargaining is required.

There is nothing startling or radical in this result. The Company's brief attempts to give the impression that, prior to the decision in the present case, neither the NLRB nor the Labor-management community had ever dreamed that employers were obligated to bargain about such matters as the contracting out of work. In fact, as we shall show, it was the Board's original decision in this case, not its ultimate decision, which departed from prevailing law. And far from changing established collective bargaining practice, the decision in this case simply confirms that employers are legally required to bargain about subjects which they have in fact always bargained about.

**B—Prior Decisions of the Board and the Courts, Including This Court, Establish That Contracting Out Is a Matter About Which Employers Are Required to Bargain.**

The Company's brief, as well as the *amicus* briefs, are replete with statements suggesting that the Board's present decision constitutes a radical departure from precedent. Even if this were so, it would not, in itself, be a basis for reversing that decision. Surely this Court is not bound by prior decisions of the Board, and no one has suggested that the decision below is in conflict with any decision of this Court. And the Board itself has not only the right but the duty to overrule its own decisions when it becomes convinced that such action is necessary in order properly to carry out the language and purposes of the Act.

But in any event, the decision in this case is, in fact, wholly

in accord with the vast majority of the relevant prior decisions of the Board and the courts, including this Court.

As early as 1941, the NLRB held that an employer is obliged to bargain with his employees' representative before transferring work from one plant to another—an action which, of course, is essentially indistinguishable from contracting out. *Gerity Whitaker Co.*, 33 N.L.R.B. 393, 406-7 (1941), *enforced in pertinent respects*, 137 F. 2d 198 (6th Cir. 1942), *cert denied*, 318 U. S. 763 (1943). Although the Board found, in that case, that the employer transferred the work in order to defeat the union, it also found that, quite apart from the employer's unlawful motivation, the unilateral transfer violated the duty to bargain:

"It is true that Gerity Whitaker had a contract with the Metal Polishers at the time of the transfer to Adrian. Its obligation to bargain with the Metal Polishers was, however, a continuing one, by virtue of the terms of the contract and the policy and provisions of the Act. That obligation was all the more important where the unilateral determination would cut off the tenure of employment of the employees and thereby undermine the contract and exclusive representative. The removal to Adrian was such a drastic and crucial change in Gerity Whitaker's employment conditions that the refusal to bargain, inherent in such removal, when presented as an accomplished fact, could not be cured by the bargaining that subsequently occurred in regard to the employment at Adrian of some employees laid off at Toledo, especially since the Geritys failed to carry out in full the understanding reached in connection with this negotiation." *Id* at 407

Subsequent to that decision, the Board has repeatedly held that an employer may not transfer work from one plant to another without bargaining with the union representing the affected employees. *E.g.*, *Brown Truck & Trailer Mfg. Co.*,

106 N.L.R.B. 999 (1953); *Bickford Shoes, Inc.*, 109 N.L.R.B. 1346 (1954); *California Footwear Co.*, 114 N.L.R.B. 765 (1955), *enforced in pertinent part*, 246 F. 2d 886 (9th Cir. 1957); *Rapid Bindery, Inc.*, 127 N.L.R.B. 212 (1960), *enforced in part*, 293 F. 2d 170 (2d Cir. 1961).

The Company argues that these cases stand only for the proposition that the employer must bargain about "measures such as termination pay (wages) or the provision of other work (tenure of employment) designed to ease the impact of the decision upon his employees" (Br. 14-15), but not about the decision itself. It is true that, in the plant move cases, the main emphasis is on the employer's obligation to bargain concerning the transfer of employees to the new location. This is because in such cases the union is generally primarily concerned with providing transfer rights to the employees, rather than preventing the move altogether. But the essential holding of the cases, nevertheless, is that a plant move constitutes a change in terms and conditions of employment which an employer cannot unilaterally make without first bargaining with the union. Only a dictum in the Second Circuit's decision in *Rapid Bindery* suggests that the bargaining duty does not extend to the basic question of whether to move or not.

And any ambiguity in the plant move cases is removed by the Board's prior decisions dealing specifically with contracting out. In *Timken Roller Bearing Co.*, 70 N.L.R.B. 500 (1946), *reversed on other grounds*, 161 F. 2d 949 (6th Cir. 1947), the complaint alleged, *inter alia*, that the employer had "refused to bargain with the Union with respect to the continuance of a practice of sub-contracting certain production and maintenance work to private contractors." 70 N.L.R.B. at 511. The employer contended, as Fibreboard does here, that this was not a matter about which it was required to bargain. The Board held to the contrary, affirming a Trial Examiner's decision which stated in part the following:

"Without attempting generally to delimit the subject matter properly included within the scope of collective bargaining, it seems apparent that the respondent's system of sub-contracting work may vitally affect its employees by progressively undermining their tenure of employment in removing or withdrawing more and more work, and hence more and more jobs, from the unit.

"... It is the respondent's duty to sit down and discuss these matters with the Union when requested to do so. During such discussion it may develop, for example, that the Union will engage to supply sufficient skilled labor in the crafts in question, so that more work may be done by the respondent's employees and less by workers outside the unit; it might be that the respondent will convince the bargaining representative that there is no reasonable alternative to a continuation of the respondent's present practice in this respect; or some other and presently unthought of solution agreeable to both parties may suggest itself.

"On none of the issues now dividing the parties is the respondent compelled to reach an agreement with the Union. Much less, as the respondent's brief seems to imply, would it be required to accede *in toto* to the demands of the bargaining representative. The requirement is that the respondent consult with the Union and explore in good faith the possibility of reaching an agreement so that, in conformity with the purposes of the Act, the matter may be removed, so far as is possible, as a cause of industrial strife." *Id* at 518

In several subsequent cases, all decided long before the present case, the Board held that an employer violates the duty to bargain when he unilaterally contracts out his employees' jobs without first bargaining with their union. *Shamrock Dairy, Inc.*, 119 N.L.R.B. 998 (1957), *enforced*, 280 F. 2d 665 (D. C. Cir. 1960), *cert. denied*, 364 U. S. 892



(1960); *Brown-Dunkin Co.*, 125 N.L.R.B. 1379 (1959), *enforced*, 287 F. 2d 17 (10th Cir. 1961); *Smith's Van & Transport Co.*, 126 N.L.R.B. 1059 (1960). See also *Hughes Tool Co.*, 100 N.L.R.B. 208 (1952) (holding that the employer was not required to bargain about contracting out *because* the union had waived its right to bargain on that subject).

It is also noteworthy that, in the two other contracting-out cases which the Board decided around the same time as the present case, and which the Company also contends were a radical departure from prior law, the Trial Examiners had not only reached the same result as the Board reached but had expressed the view that their decisions were compelled by established law. Thus, in *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F. 2d 846 (5th Cir. 1963), the Trial Examiner, writing in 1960, two years before the Board decision in this case (and before the change in Board membership which the Company makes so much of), had held:

"It is settled law that an employer's obligation to bargain in good faith encompasses the duty to afford his employees' bargaining agent an opportunity to negotiate about any contemplated change in any term or condition of employment. Plainly, the Respondent has not done so here; instead, under the guise of management prerogative, it presented the Union with a *fait accompli*, leaving nothing over which the Union could bargain. Such action was a clear rejection of the collective bargaining principle and constituted conduct in derogation of the Union's status as the majority representative of the Respondent's truckdrivers." 136 N.L.R.B. at 1040.

And in *Adams Dairy, Inc.*, 137 N.L.R.B. 815 (1962), *enforcement denied*, 322 F. 2d 553 (8th Cir. 1963), *petition for certiorari pending, No. 25, This Term*, the Trial Examiner, also writing in 1960, stated:

"... the Board has uniformly held that where, as here, an employer proposes to subcontract work performed by employees in a bargaining unit, he is first required to bargain collectively thereon with the bargaining representative of those employees [citing cases]. As the cited cases also establish, this requirement obtains even if the proposal is motivated by purely economic considerations." 137 N.L.R.B. at 823.

It is thus almost dishonest to say, as the Company does, that prior to the present decision the Board "repeatedly and consistently held that an employer was not required to bargain about a decision, motivated by legitimate business considerations, to contract out work or close or move his plant." (Br. p. 14) This becomes even more apparent when the cases cited by the Company in support of this statement are examined.

In *Brown McLaren Co.*, 34 N.L.R.B. 984 (1941), relied on by the Company, the employer contracted out certain work after having repeatedly sought from the union certain wage modifications which the Company had claimed were essential to enable it to continue the work in question on a profitable basis. After the Union had refused these requests, the company contracted out the work. The Board held:

"We think it was within the reasonable contemplation of the parties at the time the Union refused a modification in the wage provision that the respondent might subcontract or transfer the . . . work in question. Whatever duty the respondent had prior to September 21, 1937, to bargain with the Union for a wage reduction as a means of avoiding the necessity for such subcontracting or transfer, was discharged by the course of negotiations prior to September 21, 1937." *Id.* at 1006-1007.

The Board went on to explain that by the time the Union

requested further bargaining, it was simply too late, and that the company's subsequent transfer of certain additional work "was incidental to, and a direct result of the situation which impelled the removal or transfer of" the original work. "Under these circumstances," the Board said, the Company's refusal to negotiate "concerning the transfer or removal of operations from the Detroit to the Hamburg plant did not constitute a refusal to bargain collectively." *Id.* at 1007. Plainly, this is not a holding that the Company had no duty to bargain, but merely that it had discharged its duty.

*Mahoning Mining Co.*, 61 N.L.R.B. 792 (1945), also relied on by the Company, did not even involve the question of whether an employer must bargain collectively about contracting out. That case arose only after the employer had contracted out the operation of certain mines, and the union representing the employer's employees had claimed that the employer must continue to bargain with it about the terms and conditions of employment of the contractor's employees. The Board's decision rejecting this argument seems clearly correct, and has no bearing whatever on the issues in the present case.

*Celanese Corp.*, 95 N.L.R.B. 664 (1951), does contain some dicta in the Trial Examiner's decision which suggests that an employer need not bargain about contracting out. *Id.* at 713. But the issue was not raised in that case: "the General Counsel does not contend that the Company refused to bargain upon the subject of granting the maintenance work to an independent contractor." *Id.* at 708. The issue was not discussed at all in the Board's opinion.

Similarly, in *National Gas Co.*, 99 N.L.R.B. 273 (1952), the Trial Examiner did say that the employer was not obligated to bargain about its decision to contract out work, but no exceptions were filed to this aspect of the Trial Examiner's decision and the Board thus did not pass on the issue at all. See *Id.* at 277.

This leaves, at best, only two isolated Board decisions which look in the opposite direction from that taken by the Board in the present case. *Krantz Wire & Mfg. Co.*, 97 N.L.R.B. 971 (1952), *enforced sub. nom. NLRB v. Armato*, 199 F. 2d 800 (7th Cir. 1952); *Walter Holm & Co.*, 87 N.L.R.B. 1169 (1949). Both of these decisions were concerned primarily with other issues, and dealt in only the most cursory way with the question of whether an employer must bargain before discontinuing all or a portion of his business, or contracting out work. To the extent that they are in conflict with the present decision, they are also in conflict with all of the other Board decisions, cited above, which dealt much more extensively with these questions. And, as we have already demonstrated, they are in conflict with this Court's decision in *Order of Ry. Telegraphers v. Chicago & N.W.R.R.*, 362 U. S. 330 (1960).

Also relevant is this Court's decision in *Local 24, Int'l Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 (1959), 362 U. S. 605 (1960). In its first opinion in that case, this Court held that an Ohio antitrust law could not be invoked to enjoin enforcement of an agreement between the Teamsters Union and a group of trucking companies which regulated the truck rental rates to be paid by the companies when their drivers provided their own trucks. The purpose of the agreement was to prevent the companies from paying to owner-drivers rates which would undercut those established for drivers who drove the employers' trucks. The Court held, citing the *Timken* case referred to above, that the agreement dealt with a subject matter about which the National Labor Relations Act required bargaining, and therefore could not be invalidated by state law. 358 U. S. at 294-95.

The same agreement also provided that hired or leased trucks, if not owner-driven, could be operated only by employees of the companies who were parties to the agreement, and it further required those companies to use their own

trucks before hiring extra equipment. This was, of course, an agreement restricting the companies' right to contract out work. After this Court's first decision, the Ohio court held that it could still enjoin enforcement of this aspect of the agreement, and the case thus came to this Court a second time. In its second opinion, this Court held that "these provisions are at least as intimately bound up with the subject of wages as the minimum rental provisions we passed on [previously]. Accordingly, as in the previous case, we hold that Ohio's antitrust law here may not be 'applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain.'"

It is thus clear that it is the Company's argument in this case, and not the decision of the Board and the court below, which flies in the face of established precedent.<sup>2</sup>

#### **C—Collective Bargaining About Contracting Out Is a Matter of Routine Throughout American Industry.**

In determining whether a particular subject matter is one about which unions and employers are required to bargain,

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<sup>2</sup> At page 15 of its brief, the Company cites a number of cases in which the question was whether an employer had contracted out work in order to defeat union organization, in violation of Section 8(a)(3) of the Act. These cases, the Company argues, reflect the view that "the legality of a unilateral action in contracting out work or closing a plant . . . [depends] entirely upon the employer's motive. . . ." Since none of the cases referred to involved any question of whether the employer refused to bargain, they plainly cannot be regarded as authority for the proposition that contracting out is not a matter about which bargaining is required. It is worth noting, however, that Section 8(a)(3) prohibits only discrimination "in regard to hire, tenure of employment, or any term or condition of employment to encourage or discourage membership in a labor organization." Thus, the cases dealing with contracting out under Section 8(a)(3), to the extent that they are relevant at all, support our position, not the Company's, since they all assume that when an employer contracts out work to discourage union membership he is discriminating "in regard to a term or condition of employment."

a primary consideration obviously must be whether, as a matter of practice, unions and employers do in fact generally bargain about that subject. The Act, after all, was passed for the purpose of "encouraging the practice and procedure of collective bargaining." Section 1, 29 U.S.C. § 151. It would be ironic indeed for it to become a means by which employers might withdraw from the collective bargaining arena matters which they have historically bargained about.

In 1961, the Labor Department's Bureau of Labor Statistics published a study entitled *Subcontracting Clauses in Major Collective Bargaining Agreements* (Bulletin No. 1304). This study examined 1687 collective bargaining agreements covering 1000 or more workers, which constitute "virtually all agreements of this size in the United States." *Id.* at 2. It found that 378 of these agreements contained provisions which expressly limited the right of management to contract out work which had been or could be performed by the employees in the bargaining unit. These limitations took a variety of different forms. "A substantial number of agreements prohibited subcontracting when qualified in-plant workers were already on layoff or on part time, or when layoff or part time would result." *Id.* at 5. Others simply provided that the union would play some role in the decision to contract out—that role ranging all the way from a veto power to a simple right to be notified and consulted. Some specified certain conditions under which work could be contracted out—for example, where the employer himself does not have available the equipment or skills necessary to do the work in question. "A number of agreements differentiated between major or new construction, maintenance, and repair work and that which was 'normal' or 'routine.' Typically such clauses reserved normal work for in-plant workers and allowed major or new construction and repair to be contracted out. . . ." *Id.* at 8.

The fact that many of the agreements studied by the



Bureau of Labor Statistics did not deal expressly with contracting out does not mean, of course, that the parties to those agreements have never bargained about contracting out. The absence of a contracting out clause proves only that the parties have not agreed on such clause—not that they haven't bargained about it.

At the time the BLS study was conducted, for example, most of the collective bargaining agreements in the basic steel industry did not have any express provision governing contracting out. As the union which represents virtually all of the employees in that particular industry, we know for a fact that the subject had been discussed in contract negotiations for many, many years, and had been the subject of dozens of arbitration awards, but the parties had simply not been able to work out a mutually acceptable contract provision on contracting out. In 1963, however, after an intensive, year long study of contracting-out in the steel industry, the union and the major steel companies adopted an "Experimental Agreement" dealing with contracting out, as well as certain other matters affecting employment security. We have reprinted the contracting-out portion of this "Experimental Agreement" as an appendix to this brief, because we believe it illustrates the manner in which labor and management, through collective bargaining, can develop rules regulating contracting out which are acceptable to both sides, and responsive to their respective needs and interests. Other examples may be found in the BLS study, and in 2 BNA, Collective Bargaining Negotiations and Contracts 65: 181-188.

Moreover, collective bargaining as it is practiced in the United States does not end with the negotiation of an agreement. The day to day administration of the agreement, through the processing and arbitrating of "grievances," is an integral part of the bargaining process. And, as this Court has acknowledged, "contracting out work is the basis

of many grievances." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 584 (1960).

It is significant that almost all arbitration awards dealing with contracting out involve collective bargaining agreements which do not contain any express provisions on this subject. And in the vast majority of cases, the arbitrators have ruled that despite the absence of any express reference to contracting out, the collective bargaining agreement must be interpreted as restricting in some degree the right of management to contract out work which is covered by the agreement. See Crawford, *The Arbitration of Disputes over Subcontracting*, published by Bureau of National Affairs in *Challenges to Arbitration: Proceedings of the Thirteenth Annual Meeting National Academy of Arbitrators* p. 51 (1960); Dash, *The Arbitration of Subcontracting Disputes*, 16 *Industrial & Labor Relations Review* 208 (1963); Greenbaum, *The Arbitration of Subcontracting Disputes: An Addendum*, *Id.* at 221.

The fact that most arbitrators find implied limitations on the right of management to contract out work, even where contracting out is not expressly mentioned in the agreement, demonstrates the direct relationship between the question of whether or in what circumstances management may contract work and other "terms and conditions of employment." And the sheer number of published arbitration awards dealing with this subject demonstrates the extent to which it is a matter commonly dealt with in collective bargaining. According to the studies cited above, there are some 114 contracting-out cases reported in the Bureau of National Affairs' "Labor Arbitration Reports" between 1947 and 1962. And this is just a small fraction of the total number of awards which have been rendered on this subject, since the vast majority of awards are not published at all.

Thus, contrary to the contention of the Company in this case, a decision that contracting out is a mandatory subject

of bargaining will not radically change existing industrial relations practice, any more than it will radically change existing law.

**D—The Duty to Bargain About Contracting Out Does Not Impose an Undue Burden Upon Management.**

The Company and the *amici* contend that the decision in this case imposes an entirely unreasonable burden on management. They argue that it is simply impractical to require an employer to bargain with his employees' representative every time he wishes to contract out work. In addition, they claim that the reasoning of the present decision cannot logically be limited to contracting out, but would apply equally to virtually every managerial decision which in some manner affects employees. Thus the Company says "the Board's decision means that the pace at which an employer does business will be limited to the pace set in bargaining by the union or unions with which he must deal" (Br. 22). The Brief for the National Association of Manufacturers even goes so far as to predict that the present decision may mean the end of the free enterprise system, and the downfall of the economy! (Br. 12-13)

These arguments are based on a number of fallacies. The first and most basic of these is the false assumption that the only way management may discharge its obligation to bargain concerning contracting out is on a case-by-case basis each time contracting out is contemplated. This is, of course, one way of handling the matter. But if an employer wishes to be free of the duty to bargain each time the question of contracting out comes up, the solution is to negotiate a general provision governing contracting out as part of an over-all collective bargaining agreement. As we have seen, such provisions are quite common. And, where they exist, the employer is free to act unilaterally, subject only to his contractual obligation to comply with the terms of the agreement. Cf. *Tidewater Associated Oil*

*Co.*, 85 N.L.R.B. 1096 (1949); *Allied Mills, Inc.*, 82 N.L.R.B. 854 (1949).

It is precisely because it is impractical to bargain on every day-to-day change in terms and conditions of employment that collective bargaining agreements are negotiated. Obviously, no business could operate if there had to be extended collective bargaining every time any employee was laid off, promoted, transferred, or terminated, or every time management changed the duties of a job, assigned overtime work, called out an employee between shifts, etc. For that reason, it is customary to prescribe rules governing these matters in a collective bargaining agreement.

"One might conceive of the parties engaging in bargaining and joint determination, without an agreement, by considering each case as it arises and disposing of it by *ad hoc* decision. But this is, of course, a wholly impractical method, particularly for a large enterprise. So the parties seek to negotiate an agreement to provide the standards to govern their future action." Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1003 (1955)

Indeed, if an employer believes that it is absolutely essential for the efficient conduct of his business to be free of all restrictions on contracting out, he is entitled to insist on a contractual provision giving him the right to contract out work as the price of a collective bargaining agreement. See, e.g., *Peerless Distributing Co.*, 144 N.L.R.B. No. 142, 54 L.R.R.M. 1285 (Nov. 13, 1963); *Hughes Tool Co.*, 100 N.L.R.B. 208 (1952). And even where a union is unwilling to give the employer *carte blanche*, there is no reason why the parties cannot reach a reasonable accommodation on this issue just as they do on the hundreds of other difficult questions which have yielded to the collective bargaining process

In short, the argument that it is impractical for an employer to bargain with a union each time he contemplates contracting out work is not an argument for holding that contracting out is not a matter for bargaining. Rather, it is an argument for dealing with contracting out by means of a contractual provision, as other terms and conditions of employment are usually dealt with, rather than on an *ad hoc* basis. This is a choice which the law leaves entirely to the parties.

Moreover, even in the absence of either an express or an implied agreement on the principles to govern contracting out—as where there is no collective bargaining agreement at all—the decision in this case does not necessarily mean that an employer must always bargain before contracting out work. That is the second fallacy in the Company's argument. The question in every case is whether the employer's action constitutes a change in terms and conditions of employment—i.e., a change in the status quo. If as a matter of practice the employer has always contracted out a certain type of work, that practice is part of the existing terms and conditions of employment.

Again, the situation is no different with respect to contracting out than it is with respect to all other bargainable matters. An employer, for example, may not make unilateral changes in wages. However, if the existing practice is to pay employees at one rate when they do one type of work and at another rate when they do another type of work, it is not necessary for the employer to bargain each time he changes an employee's rate of pay as a result of a change in work assignment. So long as the employer changes the wage rates in accordance with the existing practice, he is not changing the terms and conditions of employment.

Similarly, suppose that a trucking company which has its own repair shop for the performance of routine maintenance work on its trucks has always sent its trucks to an out-

side garage for major engine overhauls. In that situation, the employer need not bargain every time a truck is sent out for an engine overhaul, even though that work could be performed by his own mechanics. The practice of contracting out the engine overhaul work would be the existing condition of employment, and the duty to bargain about it would arise only if and when the union requested a change in that practice.

Nor does it follow from the decision in the present case that the duty to bargain extends to every managerial decision which may affect employees, regardless of how remote or indirect that effect might be. That is the third fallacy of the Company's argument. Such decisions as whether to increase or decrease prices, whether to expand or reduce research and development activities, or whether to seek new capital may ultimately have an impact on employees, but they do not immediately and directly eliminate jobs or otherwise change the terms and conditions of employment. Contracting out, as we have said, is a matter for collective bargaining not because it may indirectly affect terms and conditions of employment, but because it directly results in the diminution of the number of jobs or amount of work available to employees in the bargaining unit.

Admittedly, on the same reasoning as is applicable to contracting out, the duty to bargain does extend to such matters as whether or under what conditions the employer may introduce new equipment, *Renton News Record*, 136 N.L.R.B. 1294 (1962), whether or under what conditions the employer may discontinue part or all of his business, *Lori-Ann of Miami*, 137 N.L.R.B. 1099 (1962), or whether or under what conditions the employer may transfer work from one plant to another, *Edward Axel Roffman Associates*, 147 N.L.R.B. No. 87, 56 L.R.R.M. 1268 (1964). All of these are questions which directly involve the terms and conditions of employment. But it is no more unreasonable or burdensome to require an employer to bargain about



these matters than it is to require him to bargain about the contracting out of work. And bargaining on them, also, is essential if collective bargaining is going to serve its fundamental purpose of providing a machinery for the adjustment of the conflicting needs and interests of employees and their employers.

**E—Section 8(e) Has No Bearing on this Case.**

The National Association of Manufacturers, in its *amicus* brief, makes one additional argument. It contends that contracting out is not a matter about which employers must bargain because any agreement which would restrict contracting out would violate Section 8(e) of the Act, 27 U. S. C. § 158(e). Section 8(e) makes unlawful any contract in which an employer agrees with a union to cease doing business with another employer. The language is directly parallel to Section 8(b)(4)(B), which prohibits certain action to force an employer to cease doing business with another employer. The object of both provisions is the same: to prohibit secondary boycotts. Section 8(b)(4)(B), while prohibiting a union from engaging in a strike or picketing against a "neutral" employer to force him to stop doing business with another employer with whom the union has a dispute, does not prevent the union and the neutral employer from making an agreement which would have the same effect. Section 8(e), which was added in 1959, was simply designed to prohibit these so-called "hot cargo" agreements. The portions of the legislative history cited in the NAM's brief makes this clear.

To construe this attempt to plug an alleged loophole in the secondary boycott provisions of the Act as prohibiting any limitation on the contracting out of work would constitute the same kind of unthinking literalism as construing Section 8(b)(4)(B) as a prohibition of all picketing. But, as this Court has said, Section 8(b)(4)(B) "could not be literally construed; otherwise it would ban most strikes his-

torically considered to be lawful, so-called primary activity.” *Local 761, International Union of Electrical Workers v. N.L.R.B.*, 366 U. S. 667, 672. Instead, the “impact of the section was directed toward what is known as the secondary boycott whose ‘sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.’” *Id.* at 672. “The substantive evil condemned by Congress in §8(b)(4) is the secondary boycott. . . .” *International Brotherhood of Electrical Workers v. N.L.R.B.*, 341 U. S. 694, 705. This, and this alone, was the substantive evil also condemned by Congress in Section 8(e)

Nor do the provisos in Section 8(e) which exempt certain agreements in the construction and garment industries relating to the subcontracting of work suggest that all other agreements dealing with subcontracting are prohibited. The customary agreements in the garment and construction industry, which the statute is intended to protect, are those which prohibit the subcontracting of work to employers who do not have a union contract. In the absence of the provisos, such agreements might be regarded as a form of “hot cargo” agreement subject to the statutory ban, since they are intended to deprive non-union employers of work, not to protect bargaining unit jobs. But an agreement which prohibits or restricts contracting out not for the purpose of denying someone else the work, but for the purpose of protecting the jobs of employees in the bargaining unit, is completely outside the scope of Section 8(e).

## II. THE BOARD'S REMEDIAL ORDER REQUIRING FIBREBOARD TO RESUME ITS MAINTENANCE OPERATIONS AND REINSTATE EMPLOYEES WITH PARTIAL BACK PAY IS VALID AND PROPER.

In addition to challenging the merits of the Board's decision in this case, the Company contends that the Board's remedial order requiring resumption of the Company's

maintenance operations and reinstatement of the terminated employees with partial back pay is punitive and in excess of the Board's authority. As we shall show, however, this remedy is well within the Board's discretion, and indeed is the only remedy which could effectively carry out the purposes of the Act.

The Act provides, in Section 10(c), 29 U. S. C. § 160(c), that when the Board finds that an unfair labor practice has been committed it shall, in addition to issuing a cease and desist order, require the offender "to take such affirmative action including reinstatement of an employee, with or without back pay, as will effectuate the policies of the Act." This section has been held to confer broad discretion on the Board "to mould remedies suited to practical needs." *NLRB v. Seven-Up Bottling Co.*, 344 U. S. 344, 351-52 (1953). See also *NLRB v. Mackay Radio & Tel. Co.*, 304 U. S. 333, 348 (1938).

The Board has frequently been called upon to fashion a remedy for cases, such as the present one, in which the violation consisted of a unilateral change in terms and conditions of employment. The Board's "customary policy" in such cases is to require the employer to restore the *status quo ante*, and to make the employees whole for any loss of pay:

"It is the Board's customary policy to direct a respondent-employer to restore the status quo where he has taken unlawful unilateral action to the detriment of his employees. Such an order is warranted to prevent the wrongdoer from enjoying the fruits of his unfair labor practices and gaining an undue advantage at the bargaining table." *Herman Sausage Co.*, 122 N.L.R.B. 168, 172 (1958), *enforced*, 275 F. 2d 229 (5th Cir. 1960).

In applying this policy the Board has ordered employers to reinstate employees who lost their jobs as a result of a unilateral change in a seniority system, *West Boylston Mfg.*

*Co.*, 87 N.L.R.B. 808 (1949), to restore an incentive system unilaterally discontinued, *John W. Bolton*, 91 N.L.R.B. 989 (1950), to resume payment of commissions unilaterally discontinued, *Press Co.*, 121 N.L.R.B. 976 (1958), to reinstate a unilaterally discontinued pension plan and restore an insurance plan and wage rates which had been unilaterally revised, *Cascade Employers' Assn.*, 126 N.L.R.B. 1014 (1960), to restore a system of calculating overtime pay which the employer had unilaterally changed, *Marcus Trucking Co.*, 126 N.L.R.B. 1080 (1960), *enforced*, 286 F. 2d 583 (2d Cir. 1961).

The Board's order in the present case is nothing more than an application of that same policy. Indeed, the Board, if anything, has erred on the side of the Company, by failing to follow its usual pattern of awarding full back pay to the employees. In this case, the Board has exonerated the employer from back pay liability for the period prior to the Board's Supplemental Decision and Order. (R. 25-26).

Ideally, of course, the appropriate remedy would be to require the employer to create the situation which would have resulted from bargaining had the employer not acted without bargaining. But since there is no way of knowing what that situation would have been, the only feasible solution is to put the parties in the position they were in when the violation occurred, and then let bargaining take its course.

Obviously, it cannot be presumed that bargaining would have been fruitless. While it is conceivable that the parties might not have been able to reach an agreement, and that the Company would have contracted out its maintenance work after a bargaining impasse, it is far more likely that bargaining would have led to some solution more satisfactory to the employees. The keystone of the Act, after all, is the assumption that through collective bargaining the parties can reach agreements which maximize their respective interests.

"Participating in [collective bargaining] debate often produces changes in a seemingly fixed position either because new facts are brought to light or because the strength or weaknesses of the several arguments become apparent. Sometimes the parties hit upon some novel compromise of an issue which has been thrashed over and over. Much is gained even by giving each side a better picture of the strength of the other's convictions." Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1412 (1958).

The likelihood that good faith bargaining would have produced a solution which would have spared the employees' jobs is particularly great in the circumstances of this case. As we have seen, the Company contracted out its maintenance work solely because it felt that the terms and conditions of employment which the Union had established through collective bargaining were too costly. If the employer had originally confronted the Union with the prospect that the entire work force would be terminated unless some reduction in labor costs was achieved, it is highly unlikely that the Union would have turned a deaf ear. Contrary to popular belief, unions are rarely so short-sighted as to refuse to try to accommodate an employer who can demonstrate that he has a real economic problem, particularly when their jobs are at stake. "Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions." *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956)

The Company argues that there is a considerable amount of inconvenience, trouble and expense involved in resuming its discontinued maintenance operations. To the extent that this is so, it argues for, rather than against, the Board's order. For if the Board simply ordered the parties to bargain, without first restoring the *status quo ante*, the Union would have the task of persuading the Company to undertake that

inconvenience, trouble and expense. This would make the job of working out a mutually acceptable solution immeasurably more difficult. Indeed, that is a principal reason why employers are required to bargain *before* making changes in terms and conditions of employment. Obviously, any effective remedy for the violation in this case would have to eliminate the cost and inconvenience of restoring the status quo as a factor to be considered in the bargaining.

It is this same reasoning, of course, which justifies the award of back pay in cases such as this. Unless the Board awards back pay, the union will have to attempt to make the employees whole in collective bargaining. This also imposes a very heavy burden on the union which it would not have had but for the employer's violation.

The fact that a remedy may be costly to an employer does not, of course, make it "punitive." For example, the common remedy for a discriminatory discharge is reinstatement with back pay of the employee who was wrongfully discharged. Normally, the employer will have replaced the discharged employee, so that the result of the back pay order is that the employer has had to pay double wages. But that double liability is one which the employer has brought upon himself by his wrong, and since it is essential to the effectuation of the policies of the Act, it is not punitive. A remedy is punitive, this Court has said, only when it is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U. S. 533, 540 (1943). See also *NLRB v. Seven-Up Bottling Co.*, 344 U. S. 344 (1953); *Local 60, Carpenters v. NLRB*, 365 U. S. 651 (1961).

In some situations, of course, the Board has found that restoration of the *status quo ante* is impractical. For example, in *Renton News Record*, 136 N.L.R.B. 1294 (1962), the Board declined to require the employer to resume an operation which was obsolete. In the present case, however, the Board properly found that there were no excep-



tional circumstances which would justify a departure from its "customary policy."

"We do not believe that requirement [resumption of the maintenance operations] imposes an undue or unfair burden on Respondent. The record shows that the maintenance operation is still being performed in much the same manner as it was prior to the subcontracting arrangement. Respondent has a continuing need for the services of maintenance employees; and Respondent's subcontract is terminable at any time upon 60 days notice." (R. 25 n. 19).

The Company argues that the Board's order in this case, in so far as it provides for reinstatement of employees with back pay, violates that portion of Section 10(c) which states that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." This argument is totally without merit. Discharge for cause usually means discharge for misconduct, and the legislative history of this sentence in Section 10(c) demonstrates clearly that that is the meaning which Congress intended those words to bear. The purpose of that sentence, which was added to the Act in 1947, was to "put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H. Rep. No. 245, 80th Cong., 1st Sess. 42 (1947). Or, as stated in the Conference Report:

"Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities,

contrary to shop rules, or for Communist activities, or for other cause (see *Wyman-Gordon v. N.L.R.B.*, 153 Fed. (2) 480), will not be entitled to reinstatement." H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947).

Plainly, the employees involved in the present case were not discharged for misconduct. Their "loss of employment stemmed directly from their employer's unlawful action in bypassing their bargaining agent." (R. 25).

Thus, the Board's remedial order is well within its broad statutory authority to effectuate the purposes of the Act.

### CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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## APPENDIX

### Excerpt from Agreements Between United Steelworkers of America and Certain Major Steel Producing Companies.\*

#### Experimental Agreement

The following provisions set out below shall be effective for the period August 1, 1963 through December 31, 1964, for experimental purposes.

#### A. Contracting Out

The parties have existing rights and obligations with respect to various types of contracting out. In addition, the following supplements protections for bargaining unit employees or affirms existing management rights, whichever the case may be, as to those types of contracting out specified below:

1. (a) Production, service, and day-to-day maintenance and repair work within a plant as to which the practice has been to have such work performed by employees in the bargaining unit shall not be contracted out for performance within the plant, unless otherwise mutually agreed pursuant to paragraph 4.

(b) If production, service, and day-to-day maintenance and repair work has in the past been performed within a plant under some circumstances by employees in the bargaining unit and under some circumstances by employees of contractors, or both, such practice shall remain in effect with respect to such work performed within the plant, unless otherwise mutually agreed pursuant to paragraph 4.

(c) Production, service, and day-to-day maintenance and

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\* Most of the nation's steel companies have adopted the agreement which is represented here. Among them are: United States Steel Corp., Bethlehem Steel Co., Republic Steel Corp., Jones and Laughlin Steel Corp., Inland Steel Co., Armco Steel Corp., Youngstown Sheet and Tube Co., Wheeling Steel Corp., Pittsburgh Steel Co., Colorado Fuel and Iron Corp., and Great Lakes Steel Corp.

repair work within a plant as to which the practice has been to have such work performed by employees of contractors may continue to be contracted out, unless otherwise mutually agreed pursuant to paragraph 4.

2. Maintenance and repair work performed within the plant, other than that described in paragraph 1, and installation, replacement and reconstruction of equipment and productive facilities, other than that described in paragraph 3, may not be contracted out for performance within the plant unless contracting out under the circumstances existing as of the time the decision to contract out was made can be demonstrated by the Company to have been the more reasonable course than doing the work with bargaining unit employees, taking into consideration the significant factors which are relevant. Whether the decision was made at the particular time to avoid the obligations of this paragraph may be a relevant factor for consideration.

3. New construction including major installation, major replacement and major reconstruction of equipment and productive facilities at any plant may be contracted out, subject to any rights and obligations of the parties which, as of the beginning of the period specified above, are applicable at that plant.

4. (a) At each plant a regularly constituted committee consisting of not more than four persons (except that the committee may be enlarged to six persons by local agreement), half of whom shall be members of the bargaining unit and designated by the Union in writing to the Plant management and the other half designated in writing to the Union by the Plant management, shall attempt to resolve problems in connection with the operation, application and administration of the foregoing provisions.

(b) In addition to the requirements of paragraph 5 below, such committee may discuss any other current problems with respect to contracting out brought to the attention of the committee.

5. The Union committee members will be given notice by the Company members, when the Company believes it should have significant items of work performed in the plant by outside contractors. Should the Union committee members believe discussion to be necessary, they shall so request the Company members in writing within three days (excluding Saturdays, Sundays, and Holidays) after receipt of such notice and such a discussion shall be held within three days (excluding Saturdays, Sundays, and Holidays) thereafter. Should the committee resolve the matter, such resolution shall be final and binding. Should a discussion be held and the matter not be resolved or in the event a discussion is not held, then within thirty days from the date of the Company's notice a grievance relating to such matter may be filed under the grievance and arbitration procedure. Should the Company committee members fail to give notice as provided above, then not later than thirty days from the date of the commencement of the work a grievance relating to such matter may be filed under the grievance and arbitration procedure.

6. Any grievance relating to contracting out which occurs after June 20, 1963, and prior to August 1, 1963, shall be subject to the provisions of paragraph 1 and 2 above.

\* \* \* \* \*

OCT 8 1964

JOHN F. DAVIS, CLERK

# In the Supreme Court of the United States

OCTOBER TERM 1964

No. 14

FIBREBOARD PAPER PRODUCTS CORPORATION,  
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, EAST  
BAY UNION OF MACHINISTS, LOCAL 1304,  
UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, and UNITED STEELWORKERS  
OF AMERICA, AFL-CIO,

*Respondents.*

## Petitioner's Reply Brief

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# In the Supreme Court of the United States

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FIBREBOARD PAPER PRODUCTS CORPORATION,  
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vs.

NATIONAL LABOR RELATIONS BOARD, EAST  
BAY UNION OF MACHINISTS, LOCAL 1304,  
UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, and UNITED STEELWORKERS  
OF AMERICA, AFL-CIO,  
*Respondents.*

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## Petitioner's Reply Brief

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Early in its brief, the Board sets forth two questions which, it says, are "component parts" of the first of the questions with respect to which certiorari was granted (Bf. p. 2). These two component questions are in substance (1) whether Petitioner was under a duty to bargain about whether to contract out its maintenance work, and (2) assuming such a duty to exist, whether Petitioner violated that duty. Later on, the Board states that "Petitioner apparently concedes" that if it was under a duty to bargain, that duty was violated (Bf. p. 20).



Petitioner has made no such concession. On the contrary, it has maintained throughout the case that it in fact did bargain, and it complained in its petition for certiorari of the Board's failure to make findings upon the question and to state its reasons therefor<sup>1</sup>. We did not argue that question in our opening brief because we understood that the Court had denied certiorari with respect thereto<sup>2</sup> and that argument of the question therefore would be improper.

We turn to our reply to the arguments of the Board and the Union.

### SUMMARY OF ARGUMENT

#### I.

If the Court should abandon the view that the Act does not require bargaining about whether or not an employer shall carry on a particular operation but requires bargaining only about the wages, hours and other terms and conditions governing employment in those operations upon which he decides, the language of the Act would permit of no stopping point short of the Board's present position that the subjects of mandatory bargaining are unlimited—that they “embrace any provision which either party wishes to put in the agreement” including provisions regarding “prices, types of product, volume of production, and even methods of financing.” That position conflicts with this Court's holding in *NLRB v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958) that the subjects of mandatory bargaining are limited. It is inconceivable that the Taft-Hartley Congress intended any result such as that for which

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1. See the second question raised by our petition (p. 2) and the argument thereon (pp. 17-20).

2. The Court granted certiorari on only the first and third questions set forth in our petition (R. 183-184).

the Board now contends. But even if "terms and conditions of employment" embraced "any stipulation under which the workers agree to be employed and the management to employ them," as the Board contends, the fact still would remain that the obligation which the Board now urges the Court to impose is not concerned with the conditions under which workers are to be employed but rather with the question whether any employment relationship shall exist.

The Board's deprecation of the administrative, judicial, and legislative histories of the statutory language is unjustified. The Board's historic interpretation of that language as not requiring an employer to bargain about whether to "change his business structure, sell or contract out a portion of his operations, or make any like changes" (*Mahoning Mining Company*, 61 NLRB 792, 803 (1945)) was approved by the courts, survived two general revisions of the Act, and was never questioned until the Board, in *Town and Country Manufacturing Company, Inc.*, 136 NLRB 1022 (1962), decided to change the law.

Bargaining about such matters is by no means as widespread in practice as the Board would make out. But this is a matter upon which we need not waste words, for the question whether bargaining about a particular subject is mandatory depends for its answer, not upon the "prevailing circumstances of contemporaneous labor-management relations," but "upon what is a correct judicial interpretation of the Act as it was written by Congress." See *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 202 (1962).

The Board's involved analysis of the variety of circumstances affecting what would be required of an employer in discharging the newly conceived bargaining duty is not reassuring. The Board does not "anticipate the answers," but it nevertheless expects the employer to do so and to

make a change in his operations only at the risk that some two or three years later he will be ordered to restore the *status quo ante* because the Board's interpretation of what he has said or done, or failed to say or do, does not conform to its notion of good faith bargaining.

The Board's position is not supported by this Court's decisions. On the contrary, it cannot be reconciled with *NLRB v. Wooster Division of Borg-Warner Corporation*, *supra*, or the Court's recognition in *Wiley and Sons v. Livingston*, 376 U.S. 543, 549 (1964) of

"... the rightful prerogative of owners independently [of unions] to rearrange their businesses and even eliminate themselves as employers ..."

## II.

If Petitioner was under a duty to bargain about whether to let the maintenance contract, it satisfied that duty. Petitioner, before letting the contract, advised the Union of its intention to do so. It met with the Union's negotiating committee, stated its position frankly and supported that position with a statement of its reasons, entertained the only proposals the Union saw fit to make, rejecting them for good and sufficient reasons which it explained, and said that it would entertain a proposal, which the Union did not see fit to make, that contracting be deferred to give time for further discussion of the problem. Yet Petitioner stands convicted of a refusal to bargain. The Board's decision demonstrates the impediment which its new concept of the scope of mandatory bargaining presents to the operation of a business.

## III.

The statement in our opening brief that the present case "is the first instance in the history of the Act in which the

Board has ordered reinstatement in a case involving only a refusal to bargain" states the whole truth. In the case of an unfair labor practice strike induced by an employer's refusal to bargain, the theory upon which the Board orders reinstatement of striking workers is that the employer's refusal to take them back constitutes a discharge for union activity and violates section 8(a)(3).

The legislative and judicial history of section 10(c) compels the conclusion that it protects discharges for legitimate business reasons as well as discharges for misconduct. That conclusion is not inconsistent, as the Board asserts, with its practice of reinstating unfair labor practice strikers, for, as above stated, this is done upon the theory that the employer's refusal to take them back constitutes a discharge for union activity.

The requirement that Petitioner resume performance of its maintenance operation prior to bargaining is punitive. While the Board is permitted a certain discretion in fashioning a remedy, it is not licensed to abuse that discretion. Except for *Town and Country Manufacturing Company, supra*, which involved a section 8(a)(3) violation, and *Adams Dairy, Inc.*, 137 NLRB 815 (1962), in which enforcement was denied, 322 F.2d 553 (8th Cir. 1963), the present case is the only one, out of the many applying the Board's new concept of the scope of mandatory bargaining, in which the Board has ordered restoration of the *status quo ante*. The capricious and punitive character of the Board's order in the present case is demonstrated by comparing it with the Board's most recent decision on contracting out, *Jersey Farms Milk Service, Inc.*, 148 NLRB No. 139, released on October 2, 1964, as this brief was being written, and reproduced in the Appendix hereto.

## ARGUMENT

### I. Petitioner was not under a duty to bargain about whether to contract out its maintenance operation.

- A. The subjects of mandatory bargaining are not unlimited, as the Board contends; they do not embrace the question whether an employer shall carry on a particular operation.

The Board's brief reveals its position to be what we had deduced from its decision in this and other, *post-Town and Country Manufacturing Company* cases, namely, that the subjects of mandatory bargaining are without limit. "Terms and conditions of employment," the Board asserts, "embrace any provision which either party wishes to put in the agreement" (Bf. pp. 21-22); they "include any stipulation which either party considers so vital as to wish to make it part of the bargain" (Bf. p. 23). Thus, the same authority who in 1948 was still arguing that under a proper construction of the Act, there was *no* subject about which bargaining was mandatory (*Cox and Dunlop*, 63 Harv. L. Rev. 389, 396-397 (1948)),<sup>3</sup> has now gone to the opposite extreme of contending that there is *no* subject about which bargaining is *not* mandatory.

The two extremes (aside from the fact that they are both extremes) have this in common: Just as the 1948 contention came "too late in the day" (*Cox and Dunlop, supra*, at 397), so also does the 1964 contention; it has been settled by decisions of the Board and the courts, including this Court (see Bd. Bf. p. 22, n. 10), that there are many subjects about which bargaining, although permissible, is *not* mandatory and that a party is *not* entitled to insist to the

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3. The authors there argued: "... the use of the disjunctive 'or' in the critical phrase in section 9(a) is more consistent with the notion that the employer is not to bargain with minority unions about any of the listed subjects of bargaining than it is with the conclusion that he must bargain with the majority union about each and every subject embraced within the phrase" (63 Harv. L. Rev. at 396-397).

point of impasse upon any and every provision which he "considers so vital as to wish to make it a part of the bargain." This Court's decision to the foregoing effect was rendered in *NLRB v. Wooster Division of Borg-Warner Corporation*, 356 U.S. 342 (1958), to which we referred at some length in our opening brief (pp. 18, 19, 24, 29).

The Board concedes that its new concept would require bargaining "about a host of subjects heretofore regarded as 'management prerogatives,' including prices, types of product, volume of production, and even methods of financing" (Bf. p. 22), but asserts that "as a practical matter," the scope of bargaining would be "confined by the range of the employees' vital interests" (Bf. pp. 22-23). The Board's faith in the self-restraint of unions is not remarkable for its realism. As demonstrated by the cases to which we referred at pages 20 and 21 of our opening brief, unions in the past have regarded "the range of the employees' vital interests" as extending to control and restriction of the sale by an employer of his products, of the kinds of merchandise in which he may deal, of the hours during which he may do business, and of his prices and markets. On occasion, union proposals have been dictated by a desire for new fields to conquer,<sup>4</sup> by venality of the union leader-

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4. A recent example was a union proposal that an employer contribute to an "industry promotion fund." See *Detroit Resilient Floor Decorators Local Union No. 2265*, 136 NLRB 769 (1962), enf. 317 F.2d 269 (6th Cir. 1963). The Board, in holding that the proposal did not relate to a subject of mandatory bargaining, said:

"The ability of an employer or an industry to meet changing conditions may, as the Respondent argues, affect employees' opportunities in the long run, and labor organizations are understandably concerned with the future of the industries from which their members derive their livelihood. • • • To hold, however, under this Act, that one party must bargain at the behest of another on any matter which might conceivably enhance the prospects of the industry would transform bargaining over the compensation, hours, and employment



ship or its desire for power,<sup>5</sup> and even by political and ideological considerations.<sup>6</sup>

We do not find convincing the Board's contention that the national policy for which it now contends would minimize "economic warfare" (Bf. p. 23; and see pp. 37-42). We suggest that extension of the protection of the Act to strikes in support of proposals "about a host of subjects heretofore regarded as 'management prerogatives'" would foment and encourage economic warfare in new fields.

However, even if the Board's position had no other weakness, it would still have this Achilles' heel: It represents a far-reaching change in what this Court has heretofore held the law to be. The subjects of mandatory bargaining are *not* unlimited; there are many subjects about which bargaining, although permissible, is *not* mandatory, and about which "each party is free to bargain or not to bargain." *NLRB v. Wooster Division of Borg-Warner Corporation*, *supra*, 356 U.S. at 349. The only question now open is where Congress drew the line.

The answer to the foregoing question, we submit, is that which we gave in our opening brief. The Act does not

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conditions of employees into a debate over policy objectives." (136 NLRB at 771.)

The decision was rendered a month before the Board decided in *Town and Country Manufacturing Company* to change the law. Under the concept for which the Board now contends, the employer would be under a duty to bargain upon the proposal.

5. Hence, the enactment of section 302 of the Taft-Hartley Act declaring unlawful payments to unions or their officers with certain exceptions, including contributions to certain types of trust funds having specified safeguards (29 U.S.C. § 186).

6. Hence, the enactment as section 9(h) of the Taft-Hartley Act of the provision (later repealed as unworkable, 73 Stat. 525) denying the facilities of the Board to unions whose officers failed to file non-communist affidavits (61 Stat. 136, 146). See also *NLRB v. Longshoremen's Association*, 332 F.2d 992 (4th Cir. 1964), involving refusal of a union to permit longshoremen employed by a stevedoring contractor to service a foreign ship trading with Cuba.

require bargaining about the composition of an employer's business operations; it requires bargaining only about the wages, hours and other terms and conditions upon which men are to be employed in those operations upon which he decides. This, we repeat, is the interpretation to which the Board and the courts had adhered, and to which Congress had twice given its tacit approval, during the twenty-seven years which elapsed before the Board's adoption of its present position (see our opening brief, pp. 14-16, 30-36).

The language of the Act does not permit of any middle ground between the foregoing interpretation and that which the Board now advocates. If the Court should start down the path along which the Board seeks to entice it, there would be no stopping point short of mandatory bargaining about "prices, types of product, volume of production, and even methods of financing."<sup>7</sup>

We do not understand how anyone acquainted with the temper and purposes of the Taft-Hartley Congress could believe that it intended by its use of the phrase "wages, hours, and other terms and conditions of employment" to call for such a result. If that Congress was interested in

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7. This the Board is candid enough to concede (Bf. p. 22). However, both the Board and the Union seem to be suggesting at points in their briefs that a decision against Petitioners in the present case would not really be a start down the path above mentioned. Thus the Board and the Union intimate that Fluor was not truly an independent maintenance contractor by referring to it as a "labor contractor" (Bd. Bf. 63) and a "labor broker" (Un. Bf. p. 5). That suggestion is foreclosed by the allegation of the complaint that Fluor undertook to perform the maintenance work "acting as an independent contractor, supplying its own employees" (R. 6). Both the Board (Bf. p. 27) and the Union (Bf. p. 5) assert that the work had to be done in any event, but this does not differentiate the case from a case involving some other type of contract, or the use of common-carrier trucks, or the purchase of a component, or even the sale of a business. In each case, the work still has to be done. The controlling fact is that the employer has rearranged his business so that he no longer performs the operation himself; it is performed by another employer.

enacting extremes, its interest most certainly did not lay in the direction of the extreme represented by the Board's present position.

But even if the Board's present position were valid, it would be difficult to see how it could have any application to a case like the present. If, as the Board contends, the phrase "terms and conditions of employment" embraced "any stipulations under which the workers agree to be employed and the management to employ them" (Bf. pp. 21-22), the fact still would remain that Petitioner did not want to employ anyone in the bargaining unit in question and that, as pointed out in the Board's original decision, the obligation which this Court is now urged to impose is not concerned with the conditions under which workers are to be employed but rather the question whether any employment relationship shall exist. See our opening brief, pp. 36-39.

**B. Our account of the past interpretation of the Act is historically accurate; the present decision represents a change in the law as it had theretofore been construed with Congressional approval.**

The account in our opening brief (pp. 30-33) of the administrative interpretation of the Act is not, as the Board asserts, "historically inaccurate." The Board's decisions held exactly what we state that they held. While in *Brown-McLaren Manufacturing Company*, 34 NLRB 984 (1941), the employer had discharged "whatever duty" it may have "had prior to September 21, 1937, to bargain with the union for a wage reduction as a means of avoiding the necessity for . . . subcontracting or transfer" (34 NLRB at 1006), it nevertheless refused repeatedly during the ensuing two years to bargain about the letting of contracts and removals of machinery notwithstanding an offer by the union in March, 1938, "to accept a reduction in wages" (34

NLRB at 1003). In *Mahoning Mining Company*, 61 NLRB 792 (1945), complaint was made not only of the employer's refusal to bargain with respect to employees of the contractor, but also of its conduct in entering into the contract without binding the contractor to the terms of its union agreement (61 NLRB at 803). However, if the case was distinguishable on its facts, there certainly was nothing equivocal about its language.

"... the Board has never held that once it has established an appropriate unit for bargaining purposes, an employer may not in good faith without regard to union organization of employees, change his business structure, sell or contract out a portion of his operations, or make any like change which might affect the constituency of the appropriate unit without first consulting the bargaining representative of the employees affected by the proposed business change." 61 NLRB at 803.

The Board attempts to distinguish certain of the decisions which we have cited upon the ground that there is a difference between going out of business and contracting out (Bd. Bf. p. 61). But the decisions did not regard the two situations as different. In *Walter Holm Co.*, 87 NLRB 1169 (1949), the Board was dealing with contracting out and equated it with "going out of business" (see our opening brief, pp. 31-32). In *Celanese Corporation of America*, 95 NLRB 664 (1951), the Board did the same thing (see our opening brief, p. 32). And in *Mahoning Mining Company*, quoted above, the Board spoke in a single breath of the employer's right to "sell or contract out" without prior consultation with the union.

The language above quoted from *Mahoning Mining Company* was not buried in a trial examiner's report but was the language of the Board itself and when the Taft-Hartley Act was passed two years later, was the Board's latest pro-

nouncement upon the subject. Presumably, Congress took the Board at its word.

The Board's brief (p. 60) refers to the fact that in 1947, the House bill contained a detailed listing of the subjects upon which bargaining was to be required and that the minority report of the House Labor Committee criticised the listing upon the ground, among others, that it would exclude "subcontracting of work, and a host of other matters." (H.R. Rep. No. 245, 80th Cong., 1st Sess. 64, 71 (1947).) However, the Board neglects to mention that the same Congressmen who had signed the House minority report<sup>8</sup> also voted against the bill as finally enacted (93 Cong. Rec. 3671). We have not relied upon this bit of legislative history because it is equivocal, but by the same token, we do not think that the Board can derive comfort from it.

We have never contended, as the Board seems to suggest that we have, that section 8(d) of the Act excludes from its bargaining requirement all subjects other than those which the Board, prior to 1947, had specifically held to be subjects of mandatory bargaining. What we do contend is that section 8(d), in adopting the language which section 9(a) had contained from the beginning, adopted the construction which the Board had placed upon that language in holding that it did *not* require an employer to bargain about whether he should "change his business structure, sell or contract out a portion of his operations, or make any like change." *Mahoning Mining Company*, *supra*. And what we further contend is that when, in 1959, after the rendition of four more Board decisions to the same effect,<sup>9</sup> Congress again

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8. Congressmen Kelley, Kennedy, Klein, Lesinski, Madden and Powell.

9. *Walter Holm & Company*, 87 NLRB 1169 (1949), *Celanese Corporation of America*, 95 NLRB 664 (1951), *Krantz Wire & Mfg. Co.*, 97 NLRB 971 (1952), and *National Gas Company*, 99 NLRB 273 (1952), all digested at pages 31-33 of our opening brief.

subjected the Act to a general revision without changing the pertinent language, it again ratified that construction.

As for *Gerity Whitaker Co.*, 33 NLRB 393 (1941), which the Union cites at page 24 of its brief, that was a case of a transfer of operations in which "a substantial cause of the transfer was the Gerity's plan to thwart the Metal Polishers and evade Gerity Whitaker's obligations under the contract and the Act." 33 NLRB at 406. The Board therefore held:

"Thus Gerity Whitaker, as part of the unlawful plan, settled unilaterally a fundamental question concerning terms and conditions of employment in which its employees were vitally interested, forestalled collective bargaining, and thereby refused to bargain collectively within the meaning of Section 8(5) of the Act." 33 NLRB at 406; emphasis supplied.

The Union, at pages 24 and 25 of its brief, cites certain cases (all post-Taft-Hartley) as having held "that an employer may not transfer work from one plant to another without bargaining with the union representing the affected employees," but the Union avoids saying what the employer was supposed to bargain about. All of these cases were cited at pages 14 and 15 of our opening brief. What they in fact held was that the employer should have bargained about *transferring employees* (tenure of employment). In none of them was there the slightest suggestion that the employer should have bargained about whether it should move the work; on the contrary, in *Rapid Bindery, Inc.*, the Court of Appeals expressly stated:

"We are also of the opinion that inasmuch as the move was made through a legitimate exercise of managerial discretion the issue of whether it was to be made need not have been submitted by respondents for discussion at the collective bargaining table." 293 F.2d at 172.



At pages 26 and 27 of its brief, the Union cites certain cases (all post-Taft-Hartley and all but one post-Landrum-Griffin) as having held that "an employer violates the duty to bargain when he unilaterally contracts out his employees' jobs without first bargaining with the union." One of the cases cited (*Shamrock Dairy, Inc.*), like the cases mentioned in the preceding paragraph, involved failure to give the union an opportunity to bargain about tenure of employment. All of the others, like *Gerity Whitaker Co.*, *supra*, involved contracting out for the purpose of thwarting unionization, and the finding of a refusal to bargain was based upon that fact. The same was true of the cases cited by the Board at pages 55-58 of its brief. None of these cases suggest that the employer would have been guilty of a refusal to bargain in the absence of the unlawful motivation above mentioned. On the contrary, in *NLRB v. Brown-Dunkin Company*, the court said:

"But the Company was free to subcontract the employees' work, thereby severing the employer-employee relationship, so long as the subcontracting was not made a subterfuge or an easy device for evading the statutory obligations to bargain in good faith. The crucial and decisive fact is whether, as the Board found, the work of the employees was subcontracted to another in order to evade the collective bargaining process. The Company may not discontinue a part of an integrated operation merely because the employees engaged in the particular unit seek Union representation. In circumstances like these, motivation becomes important, indeed decisive . . ." 287 F.2d at 19.

Neither the Board nor the Union make any reference to the numerous other cases cited at page 15 of our opening brief which likewise made the legality of unilateral action in contracting out work or closing a plant depend entirely upon the employer's motive.

It is true, as the Board asserts, that the remarks quoted at page 16, n. 5, of our opening brief from Arthur J. Goldberg, "Management's Reserved Rights: A Labor View," were directed to management's reserved rights under a bargaining contract. But it is also true that those remarks dealt with "the countless questions which arise and are not covered by wages, hours, and working conditions." "Management," it was stated, "determines the product, the machine to be manned, the manufacturing method, the plant layout, the plant organization, and innumerable other questions." When the employer institutes a new method of manufacture, the union's interest lies in the fixing "of working arrangements, crews, spell periods, schedules, etc." This, we submit, is exactly the line which Congress drew,

It also is true that no mention was made one way or the other of contracting out, but for what was the general understanding upon that subject, we refer the Court to an authority upon which the Board, in other connections, has placed considerable reliance, to wit, *Slichter, et al., The Impact of Collective Bargaining on Management* (Brookings Institution, 1960), where, at page 230, the authors state:

"Historically, American business enterprise has been free to decide the extent to which it would subcontract some of its work to other enterprises. These decisions were considered an inherent management function not affected by the presence or absence of a union."

- C. The notions of the Board and Union as to the extent and success in practice of bargaining about contracting out are exaggerated, and in any event are irrelevant.

Both the Board and the Union assert that in practice, bargaining about subcontracting is widespread. To substantiate that assertion, they refer to bargaining contracts which

contain provisions restricting the employer's right to contract out and to arbitration awards holding that the employer's right to contract out is restricted even in the absence of such a provision.

The only study of which we know of the number of contracts containing provisions restricting contracting out is the study by the Bureau of Labor Statistics to which we referred at page 27 (n. 15) of our opening brief. Of the 1687 major collective bargaining contracts studied, fewer than one-fifth (18+ percent) made any reference to contracting out and only four prohibited the practice outright.

As for the arbitration awards cited by the Board, some do not hold what the Board cites them as holding<sup>10</sup>, and others are the product of peculiar notions (often those of laymen) as to the nature of collective bargaining contracts<sup>11</sup>

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10. *Kennecott Copper Corp.*, 34 L.A. 763, cited at page 33 of the Board's brief, held that the contract did *not* contain an implied prohibition of the contracting out there involved. To the same effect was *Temco Aircraft Corp.*, 27 L.A. 233, cited at page 33, n. 27 of the Board's brief.

11. The notion that a right upon the part of the employer to contract out work would render a collective bargaining contract "illusory" or enable him to "subvert" its provisions springs from a misconception of the nature of a bargaining contract. As this Court has said:

"Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established" (*J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-335 (1944)).

and as to what this Court has held.<sup>12</sup> On the other hand are many awards applying the traditional and sensible view that an employer retains all of the rights which he would have in the absence of contract except as the contract otherwise provides.<sup>13</sup> If, as the Board asserts, contracting out is "one of the most inflammatory issues in labor-management

12. For example, *Vulcan Rivet & Bolt Co.*, 36 L.A. 871, referred to this Court as having held in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), that "where the Agreement contains no specific reference to contracting out of work . . . since the Agreement does not allow contracting out, the employer may not unilaterally contract out work within the job classifications covered by the Agreement" (36 L.A. at 872-873). Of course, the *Warrior & Gulf* case held no such thing. It held merely that a union contention that its bargaining contract prohibited contracting out, no matter how lacking in merit that contention might be, was sufficient to raise a question as to the interpretation of the contract within the meaning of the arbitration clause.

13. *Phillips Petroleum Co.*, 33 L.A. 379; *California and Hawaiian Sugar Refining Corporation*, 35 L.A. 695; *Hewitt-Robins, Inc.*, 30 L.A. 81; *Monsanto Chemical Co.*, 27 L.A. 736; *Mansfield Tire and Rubber Co.*, 35 L.A. 434; *Braun Baking Co.*, 37 L.A. 169; *Black-Clawson Co.*, 34 L.A. 215; *Wisconsin Natural Gas Co.*, 31 L.A. 880; *Bethlehem Steel Co.*, 30 L.A. 678; *Illinois Bell Telephone Co.*, 15 L.A. 274. That view was voiced by this Court in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), when it said:

"Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from performance of them. Management hires, fires, and pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions. A collective bargaining agreement may treat only with certain specific practices, leaving the rest to management but subject to the possibility of work stoppages. When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes." (363 U.S. at 583.)

And see *Handler and Hays, Cases and Materials on Labor Law* (4th Ed., 1963), p. 386.

relations today" (Bd. Bf. p. 37), this is largely attributable to the Board's decision in the present case.<sup>14</sup>

However, we do not propose to allow the question before the Court to be lost in a fog of irrelevancies. The content of contract proposals made in practice is as varied as the ambitions, sense of responsibility and ingenuity of the union leaderships who make them. They have by no means been confined to subjects of mandatory bargaining, and employers have not always been successful in resisting them. Proposals have been made and accepted upon subjects about which bargaining is not even permissible.<sup>15</sup> The question whether bargaining upon a particular subject is mandatory depends for its answer, not upon the "prevailing circumstances of contemporary labor-management relations," but upon "what is a correct judicial interpretation of the Act as it was written by Congress." See *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 202 (1962).

**D. The Board's argument that the duty to bargain would be easily satisfied and no obstacle to efficient business management is not reassuring.**

In an effort to render its new bargaining concept more palatable, the Board argues in substance that in some circumstances the duty to bargain would be easily satisfied. It is not necessarily true, it says, "that an employer must

14. See *Chandler, Management Rights and Union Interests* (McGraw-Hill, 1964), pp. 7, 242, cited at page 37 of the Board's brief.

15. See, e.g., *Charles E. Daboll, Jr.*, 105 NLRB 311 (1953), enf. 216 F.2d 443 (9th Cir. 1954); cert. den. 348 U.S. 917; *Krambo Food Stores, Inc.*, 106 NLRB 870 (1953); *Seaboard Terminal and Refrigeration Co.*, 114 NLRB 1391 (1955); *Reading Tube Corporation*, 120 NLRB 1604 (1958); *Standard Molding Corporation*, 137 NLRB 1515 (1962); *International Association of Machinists*, 123 NLRB 627 (1959); enf. 279 F.2d 761 (9th Cir. 1960), cert. den. 364 U.S. 890; *Employing Lithographers*, 130 NLRB 968 (1961), enf. 301 F.2d 20 (5th Cir. 1962).

always consult with the union before letting . . . a contract"<sup>16</sup> (Bf. p. 43). Whether or not prior consultation would be required would depend "upon each particular situation, including the terms of any relevant collective agreement and the customs and practices of the industry" (*id.*). ". . . one can imagine some situations in which business exigencies would necessitate prompt action but others in which there would be ample time for detailed negotiation" (Bf. p. 44). Whether unilateral action without prior negotiation "is appropriate in some cases can be decided when the question is raised in a particular case" (Bf. p. 49). The answer may depend on "business exigencies" or on "the kind of subcontracting" (*id.*). The required length of the negotiations also would depend on "the character of the subcontracting and the exigencies of the particular business situation" (*id.*); it "would vary with the circumstances" (Bf. p. 50), and would have "to take into account the exigencies of the business and the potentials of further negotiations" (Bf. p. 51).

The Board disclaims any attempt at an analysis of "the problem in all of its ramifications" (Bf. p. 48), and says that it does "not anticipate the answers" (Bf. p. 49). However, it expects the employer to do so. And it expects him to do so, not only with respect to contracting out but also with respect to the purchase of new machines, the adoption of new processes, the purchase of components in place of fabricating them himself, the marketing of his product through independent distributors rather than through a sales force of his own, the shipment of his products by common or contract carrier rather than by trucks of his own, the performance of particular operations in one plant rather than in

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16. Contrast this statement with the following from the Board's decision in the present case:

" . . . prior discussion with a duly designated bargaining representative is all that the Act contemplates. *But it commands no less*" (R. 21; emphasis supplied).



another, the purchase of a product already packaged rather than packaging it himself, the sale or discontinuance of an operation, the discontinuance of an unprofitable line (for all of the foregoing, see cases cited in our opening brief, pp. 17-18), and a "host" of other subjects about which the Board would now require bargaining, "including prices, types of product, volume of production, and even methods of financing" (Bd. Bf. p. 22).

"An employer," the Board asserts, "is under no duty to yield to the union" (Bf. p. 49), but the fact remains that yielding is the only sure way of avoiding conviction of a refusal to bargain.

An employer need not engage "in fruitless marathon discussions at the expense of frank statement and support of his position" (Bd. Bf. p. 51); yet frank statement and support of its position convicted Petitioner of a refusal to bargain.

It is literally impossible, as the Board's brief demonstrates, for an employer to judge with nicety just what is required of him or to anticipate the interpretation which the Board will later place upon what he has said or failed to say and upon what he has done or failed to do. If he is unwilling to yield to the union's position, then caution requires that he engage in the "marathon discussions" above mentioned, and even these will not assure him of safety. Two or three years later, he may find himself confronted, as is Petitioner in the present case, with an order that he restore the *status quo ante*, reinstate displaced employees with back pay, and start all over again. Because it states the matter so well, we refer the Court once again to the dissent from the Board's supplemental decision in the present case (R. 32):

"The time involved in extensive negotiations and in protracted litigation before the Board, together with the numerous technical vagaries, practical uncertainties, and changing concepts which abound in the area of so-called 'good faith bargaining,' make it impossible for management to know when, if, or ever, any action on its part would be clearly permissible. These factors, together with the crushing, burdensome remedy, which this Agency will retroactively impose upon a given enterprise, should the National Labor Relations Board determine that the action of management was (for whatever reason) improperly taken, will serve effectively to retard and stifle sound and necessary management decisions. Such a result, in my opinion, is compatible neither with the law, nor with sound business practice, nor with a so-called free and competitive economy."

**E. The decisions of this Court do not support the Board's position.**

We have said all that we have to say about *Order of Railroad Telegraphers v. Chicago & Northwestern Railroad Co.*, 362 U.S. 330 (1960) and *Teamsters Union v. Oliver*, 358 U.S. 283 (1959) except that the Board is incorrect in asserting that the latter case involved "a form of subcontracting" (Bf. p. 57); it involved the hiring of trucks to be driven by the employer's own employees, some of whom owned the trucks being hired.

If the *Railroad Telegraphers* case means what the Board says it does, then we do not know how it can be reconciled with the Court's statement in *Virginia Railway Co. v. System Federation*, 300 U.S. 515 (1937), that

"Whether the railroad should do its repair work in its own shops, or in those of another, is a question of railroad management." 300 U.S. at 557; see our opening brief, p. 25, n. 14.

If the *Oliver* case means what the Board say it does, then we do not know how it can be reconciled with the language of *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) where the Court noted that unions "ordinarily do not take part in negotiations leading to a change in corporate ownership" and referred to

"the rightful prerogative of owners *independently* to rearrange their businesses and even eliminate themselves as employers . . ." 376 U.S. at 549 (emphasis supplied); see our opening brief, pp. 28-29.

This Court held in the *Borg-Warner* case, *supra*, that the subjects of mandatory bargaining are limited, and we submit that the cases just quoted confirm what we have said about where the limit lies.

**II. If Petitioner was under a statutory duty to bargain about whether to let the contract, it satisfied that duty.**

The meeting of July 30, 1959, between Fibreboard and the Union's negotiating committee took place against this background:

In each of the annual negotiations during the past few years, Fibreboard had told the Union that its costs were too high and had endeavored to persuade the Union to modify its proposals in the light of that fact (R. 53-54, 103-104). Its efforts had been unsuccessful (R. 104). The Union's current proposals involved increases in all cost items in its contract (R. 61), and in a letter written on July 29, the Union had taken the position that its contract was automatically renewed subject only to an obligation upon the part of Petitioner to negotiate regarding the proposed increases (R. 51).

Petitioner, in the meeting of July 30, did not tell the Union that its decision to contract out the work was irre-

vocable or assert the existence of a "management prerogative."<sup>17</sup> On the contrary, it explained fully the reasons for its decision (the high costs of which it had previously complained: R. 53-54) and iterated and reiterated its willingness to discuss any questions the Union might have (R. 50, 53, 54). Recognizing that the time for discussion was short, Petitioner said that if the Steelworkers wished the letting of the contract to be deferred so as to permit them "to discuss the maintenance work contract at some later date, they should say so and [Petitioner] would give the request due consideration" (R. 54; see also R. 86), but the Union did not see fit to take advantage of that suggestion (R. 86). Petitioner's statements that negotiation of a new contract would be pointless and that it was not present for that purpose were made in the light of the fact that the only contract proposals before it were those above mentioned. The Union did not understand that Petitioner's mind was closed, for it proposed that the question whether the work should be let to a contractor be submitted to arbitration (R. 88). Petitioner, being unwilling to entrust a business decision to an arbitrator, rejected that proposal (*id.*). There can be only speculation as to the reception that Petitioner would have accorded a Union wage and manning proposal permitting of cost savings, for the Union never made any such proposal or indicated the slightest interest in doing so.

Petitioner engaged in the "prior discussion" which, according to the Board's decision, "is all that the Act contemplates" (R. 21).

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17. The court below in its opinion attributed to Petitioner reliance upon its "management prerogative" (R. 174) and so does the Board in its Brief (p. 65). This is without support in the record. At no time did Petitioner assert a "management prerogative"; never was that phrase or the term "prerogative" used by Petitioner.

It stated its position frankly and supported that position with a statement of its reasons.

It entertained the only proposals which the Union saw fit to make, and rejected them for good and sufficient reasons which it explained.

It proffered further time for discussion, but the Union was not interested.

Yet Petitioner stands convicted of having refused to bargain and is faced with an order requiring it to resume performance of the maintenance operation and reinstate with back pay the individuals who had been employed therein.

In the acoustics provided by the foregoing facts,<sup>18</sup> the Board's assertions in its decision and its Brief that "prior discussion . . . is all that the Act contemplates," (R. 21) that the Act "does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position" (Bf. p. 51), and that an employer need not "yield to a union's demand that a subcontract not be let" (Bf. p. 50) all ring hollow.

What has happened here is an example of the havoc which can be raised with an employer's efforts to run his business by the Board's new concept of the scope of mandatory bargaining.

### **III. The Board's order violates section 10(c) of the Act and is punitive.**

We asserted in our opening brief (p. 39) that the present case "is the first instance in the history of the Act in which the Board has ordered reinstatement in a case involving

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18. Virtually all of the facts stated in the text were set forth in the Trial Examiner's findings, which were adopted by the Board (R. 35). The truth is, as was set forth at page 8, n. 4, of our opening brief, that the Board never considered the question whether Petitioner had in fact satisfied the duty to bargain to which the Board's supplemental decision gave birth.

only a refusal to bargain." The Board asserts that this is not the "whole truth"—that in the case of a strike induced by a refusal practice, it has been the Board's practice to order the reinstatement of the strikers, even though they have been replaced, "as a remedy for the violation of section 8(a)(5)" (Bf. p. 71). That statement is untrue. The theory upon which the Board orders the reinstatement of strikers (whether their strike be economic or induced by unfair labor practices) is that the employer's refusal to take them back constitutes a discharge for union activity and is violative of section 8(a)(3).<sup>19</sup> There will be found no case ordering reinstatement in which the order was not supported by a finding of a section 8(a)(3) violation.

**A. The order of reinstatement violates section 10(c).**

The only argument advanced by either the Board or the Union in support of their position that section 10(c) goes no further than to protect discharges for misconduct is the

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19. Thus, for example, in *NLRB v. Denton*, 217 F.2d 567 (5th Cir. 1954), cert. den. 348 U.S. 981, the court agreed with the Board that the strike had been induced by the employer's refusal to bargain and was, therefore, an unfair labor practice strike and held: "It follows that the striking employees were properly held entitled to reinstatement as of July 9, 1952, the date of their unconditional application, and that the Company's refusal to grant them reemployment was in violation of Sections 8(a)(3) and (1) of the Act." 217 F.2d at 571-72.

In *Waycross Machine Shop*, 123 NLRB 1331 (1959), enf. 283 F.2d 733 (5th Cir. 1960), the Board, after finding that the strike was an unfair labor practice strike induced by the employer's refusal to bargain, held:

"Accordingly we find that the Respondent was obligated to rehire the strikers when the Union made unconditional application on their behalf on September 26, and that the Respondent's refusal to do so violated Section 8(a)(3) of the Act. We shall therefore order the Respondent to offer the following strikers immediate and full reinstatement to their former or substantially equivalent positions . . ." 123 NLRB at 1336.



Board's incorrect assertion that a contrary interpretation would "upset the settled practice of ordering the reinstatement of unfair labor practice strikers whose positions have been filled by replacements" (Bf. pp. 72-73). As above stated, the theory upon which the Board orders the reinstatement of unfair labor practice strikers is that a refusal to take them back constitutes a discharge for union activity and is violative of Section 8(a)(3). The Board's practice in such cases would be in no way affected by a holding that a discharge for legitimate business reasons is a discharge for cause and protected by section 10(c).

The bare assertion of the Board and the Union that "cause" means no more than misconduct simply contradicts the legislative history to which we have referred and which characterized all discharges for reasons other than "union activity" as discharges for "cause."

"All this language does is simply to say what the present rule is. If the Board finds that the man was discharged for cause, that is one possible outcome. If it finds that he was discharged for union activity, that is the other outcome." (93 Cong. Rec. 6518 (1947))

The "present rule," as it had been expounded by this Court, was that an employer has the right to discharge an employee "for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible" (*Associated Press v. NLRB*, 301 U.S. 103, 132 (1937); see also *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 46 (1937); *NLRB v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939)).

As for the Board's reference to the present case as one in which "the discharge flows from conduct which constitutes an unfair labor practice," this is merely a restatement of the contention of which we disposed in our opening brief

that the letting of the contract and the termination of the employees were the fruits of the asserted refusal to bargain.

**B. The Board's order is punitive.**

The Board's assertion that the principle "that restoration of the status quo tends to effectuate the policy of the Act . . . has found a wide variety of applications" (Bf. p. 67) is misleading in the extreme, as is demonstrated by the fact that all of the decisions cited in support of the assertion (p. 67, n. 46) involved violations of sections 8(a)(2) or 8(a)(3) of the Act. It certainly has not been the Board's invariable practice in simple refusal to bargain cases to order restoration of the status quo.<sup>20</sup> Indeed, with the sole exception of the present case and one other,<sup>21</sup> it has refrained from doing so even in cases applying the *Town & Country Manufacturing Company* doctrine.<sup>22</sup>

20. See, e.g., *General Motors Corporation*, 81 NLRB 779 (1949); *Duro Fittings Company*, 130 NLRB 653 (1961); *American Aggregate Co. Inc. & Featherlite Corp.*, 130 NLRB 1397 (1961), enf. in pt. 305 F.2d 559 (5th Cir. 1962); *Wheatland Electric Cooperative, Inc.*, 102 NLRB 1119 (1953), enf. 208 F.2d 878 (10th Cir. 1953); *Roy E. Hanson, Jr., Mfg.*, 137 NLRB 251 (1962); *Square D Company*, 105 NLRB 253 (1953); *National Furniture, Inc.*, 130 NLRB 712 (1961); *Richfield Oil Corporation*, 110 NLRB 356 (1954), enf. 231 F.2d 717 (D.C. Cir. 1956); *National Furniture Manufacturing Co., Inc.*, 130 NLRB 712 (1961); *W. T. Grant Co.*, 94 NLRB 1133 (1951), enf. 199 F.2d 711 (9th Cir. 1952); *Sharon Hats, Incorporated*, 127 NLRB 947 (1960), enf. 289 F.2d 628 (5th Cir. 1961). In none of these cases (and the list is by no means exhaustive) did the Board order restoration of the status quo.

21. *Adams Dairy, Inc.*, 137 NLRB 815 (1962), enf. den., 322 F.2d 553 (8th Cir. 1963). The Board's petition for certiorari is pending.

22. See *Renton News Record*, 136 NLRB 1294 (1962); *Lori-Ann of Miami*, 137 NLRB 1099 (1962); *American Manufacturing Company of Texas*, 139 NLRB 815 (1962); *Weingarten Food Center of Tenn.*, 140 NLRB 256 (1962); *Brown Transport Corporation*, 140 NLRB 954 (1963); *Star Baby Co.*, 140 NLRB 678 (1963); *West Side Lumber Co.*, 144 NLRB No. 14, 54 L.R.R.M. 1029 (1963); *Pepsi Cola Bottling Company of Beckely, Inc.*, 145 NLRB No. 82.

We do not question that the Board is permitted a certain discretion in fashioning a remedy. However, it has no license to abuse that discretion or to base its decision upon facts which exist only in its imagination. *Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Carpenters Local 60 v. NLRB*, 365 U.S. 651 (1961). If its footnote assertion (R. 25, n. 19) that its order imposed no "undue or unfair burden" on Petitioner can be given the dignity of a finding, the fact remains that it is based upon matters which do not appear of record and which Petitioner was denied the opportunity to disprove (see our opening brief, p. 9). The burden imposed upon Petitioner by the requirement that, after the lapse of three years, it rebuild a supervisory and working force with which to resume, with no prospect of reduced costs, the performance of an operation which had been abandoned as too costly and which might shortly have to be abandoned again for the same reason would not, as the Union asserts, present an obstacle to bargaining prior to a resumption of operations. A satisfactory bargain prior to the resumption of operations would avoid imposition of the foregoing burden.

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55 L.R.R.M. 1051 (1964); *Winn-Dixie Stores, Inc.*, 147 NLRB No. 89, 56 L.R.R.M. 1266 (1964); *Fairbanks Dairy, Division of Cooperdale Dairy Company*, 146 NLRB No. 111, 55 L.R.R.M. 1437 (1964); *Royal Plating and Polishing Co.*, 148 NLRB No. 59, 57 L.R.R.M. 1006 (1964); and *Jersey Farms Milk Service, Inc.*, 148 NLRB No. 139, released October 2, 1964, and reproduced in the Appendix hereto. The foregoing cases involved, variously, contracting out, substitution of a new production process for an old, discontinuance of a business, sale of a business, sale of the premises, closure of a particular plant, transfer of an operation from one plant to another, discontinuance of trucking operations in favor of shipment by common or contract carriers, and discontinuance of a packaging operation in favor of purchase of a prepackaged product. Although some of them involved a section 8(a)(3) violation as well as a refusal to bargain, in not a single one of them did the Board order restoration of the *status quo ante*.

As we have stated above, except for *Town and Country Manufacturing Company, supra*, which involved a section 8(a)(3) violation, and except for *Adams Dairy, Inc., supra*, n. 21, in which enforcement was denied, the present case is the only one applying the Board's new concept of the scope of mandatory bargaining in which the Board has ordered restoration of the *status quo ante*. The most recent of those decisions is *Jersey Farms Milk Service Inc.*, 148 NLRB No. 139, which was released on October 2, 1964, as this brief was being written, and which is reproduced in the Appendix. The capricious character of the Board's order in the present case is demonstrated by a comparison of it with that decision:

In the present case, Petitioner advised the Union in advance of its intention to contract out the work, engaged in the discussion hereinabove set forth, and bargained about, and placed in effect, a plan for severance pay (see our opening brief, p. 4). In *Jersey Farms Milk Service, Inc.*, the employer contracted out the work of its transport division without any prior notice to the union. The employer did not meet with the union until nearly a month later, when, according to the Trial Examiner, the following occurred (Appendix, p. 14):

"Business Representative Sloan asked that the men be put back to work. Counsel for Respondent asked if Charging Party had some proposal other than putting the men back to work but there was none. The meeting broke up with Charging Party asking Respondent to think about it and call them back."

That was the end of the matter.

The Board based its order denying restoration of the *status quo ante* upon four factors which it set forth as follows (Appendix, p. 2):

"(a) Respondent's earlier history of harmonious labor relations with the Union;" (In the present case, Petitioner had had a harmonious bargaining relationship with the Union for 22 years):

"(b) the absence of any apparent antiunion motivation in the unilateral subcontracting;" (In the present case, the Board has found that there was no antiunion motivation).

"(c) the economic hardship both to Respondent and to third party interests that full restoration of the *status quo ante* would entail;" (The third party interests to which the foregoing referred were those of the contractor. In the present case, Fluor will be deprived of its contract and its men of their jobs. As for the hardship to Petitioner, see our opening brief, pp. 43-45, 46).

"and (d) Respondent's subsequent willingness to bargain with the Union about the subcontract as detailed below." (This refers to the meeting set forth as above in the trial examiner's finding, in which a union proposal that the men be put back to work came to nothing. Compare the meetings between Petitioner and the Union *before* the contract was let, during which Petitioner, among other things, bargained about a plan for severance pay, which it placed in effect.)

We submit that the Board's order in the present case is capricious and is punitive.

**CONCLUSION**

We submit that the Board's Supplemental Decision and Order were erroneous for each and every one of the reasons which we have stated and that they should be denied enforcement and should be vacated.

Respectfully submitted,

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*Attorneys for Petitioner  
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*Of Counsel.*

**(Appendix follows)**



## **Appendix**

*United States of America  
Before the National Labor Relations Board*

Case No. 26-CA-1540

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Jersey Farms Milk Service, Inc.

and

Amalgamated Meat Cutters & Butcher  
Workmen of North America Local  
405, AFL-CIO

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### **DECISION AND ORDER**

On November 13, 1963, Trial Examiner George L. Powell issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and briefs in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications.

We agree with the Trial Examiner, for the reasons stated in his Decision, that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting the work of its transport division on April 8, 1963, without first notifying and bargaining with the Union. However, we do not agree with the Trial Examiner's proposed remedy for the following reasons:

In fashioning our affirmative orders, we bear in mind that the remedy should be molded to the particular situation requiring redress.<sup>1</sup> Having scrutinized the record and weighed the particular facts and circumstances surrounding this case, including cumulatively (a) Respondent's earlier history of harmonious labor relations with the Union<sup>2</sup> (b) the absence of any apparent antiunion motivation in the unilateral subcontracting; (c) the economic hardship both to Respondent and to third party interests that full restoration of the *status quo ante* would entail;<sup>3</sup> and (d) Respondent's subsequent willingness to bargain with the Union about the subcontract<sup>4</sup> as detailed below—we agree with the finding of the Trial Examiner that an order to restore the *status quo ante* is inappropriate in this case.<sup>5</sup>

Even though the unilaterally discontinued operation is not ordered restored, effectuation of the policies of the Act does require that the Respondent be directed now to remedy the violation found by offering to bargain about resumption of the operation it contracted out and any proposed alternatives thereto, including steps that might be taken to

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1. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 338, 348. 148 NLRB No. 139

2. *Crown Zellerbach Corporation*, 95 NLRB 753.

3. *Renton News Record*, 136 NLRB 1294.

4. *Hartmann Luggage Company*, 145 NLRB No. 151.

5. *Winn-Dixie Stores, Inc.*, 147 NLRB 89.

minimize the effects upon employees of the action taken.<sup>6</sup> And while under other circumstances we might have considered it appropriate to require the Respondent to make whole its transport division employees for all losses of pay they may have suffered during the period from April 8, 1963, the date of the violation, until the date such violation is fully remedied,<sup>7</sup> we do not believe that the full measure of such remedial relief is warranted under the special facts of this case. Thus it appears that the Respondent did meet with the Union on May 6, 1963, at which meeting only the question of reinstating the men was discussed.<sup>8</sup> Although the parties did not "bargain" to impasse on that occasion concerning the subcontracting, we believe that to the extent the reinstatement of employees was discussed, the Employer discharged his duty to bargain on that aspect of the matter. Consequently, we are limiting remedial monetary relief to the employees to the period between April 8 and May 6, 1963.<sup>9</sup> Our order, in short, recognizes that the backpay obligation terminates on May 6, 1963, but that the bargaining obligation still exists.

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Jersey Farms Milk Service,

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6. *Ibid.*

7. *Ibid.*

8. At that time only two of the men had lost employment; the remainder had been either transferred by the Respondent or hired by the subcontractor.

9. Backpay shall be based upon the earnings which the affected employees would normally have received during the mentioned period less any net interim earnings, with interest at 6 percent per annum. *Ysis Plumbing & Heating Co.*, 138 NLRB 716.

Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively with Amalgamated Meat Cutters & Butchers Workmen of North America, Local 405, AFL-CIO, as the exclusive representative of its employees in the appropriate bargaining unit,<sup>10</sup> by unilaterally contracting out work affecting the terms and conditions of employment of employees within the aforesaid unit without prior notice to, and bargaining with, the Union.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the Union named above, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all such activities.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Bargain with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, with respect to the contracting out of the transport division work, including the possible restoration of the transport division, and the effects of contracting out the work of the said division upon the employees thereof.

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10. The appropriate unit is composed of all employees of Respondent, employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden, and Murfreesboro, Tennessee, excluding all office clerical employees, managers, route managers, city salesmen, field men, professional employees, guards, watchmen, and supervisors as defined in the Act.

(b) Put in writing and sign any agreement made as a result of such bargaining.

(c) Make whole the employees of the transport division, in the manner set forth in this Decision, for any loss of earnings which they may have suffered during the period from April 8, 1963, to May 6, 1963, by reason of the Respondent's unilateral action in subcontracting the work of that division.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of reimbursement due under the terms of this Order.

(e) Post in its plant in Nashville, Tennessee, copies of the notice attached hereto marked "Appendix."<sup>11</sup> Copies of such notice, to be furnished by the Regional Director for the Twenty-sixth Region, shall after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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11. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

*Appendix*

(f) Notify the Regional Director for the Twenty-sixth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C.

-----  
Frank W. McCulloch,      Chairman

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John H. Fanning,      Member

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Gerald A. Brown,      Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD



**APPENDIX**

**NOTICE TO ALL EMPLOYEES**

**Pursuant to a Decision and Order**

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not fail or refuse to bargain collectively with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, as the exclusive representative of all our employees in the appropriate bargaining unit described herein by unilaterally contracting out work affecting the terms and conditions of employment of employees within the bargaining unit without prior notice to, and bargaining with, the aforesaid Union.

The appropriate bargaining unit is:

All employees of Respondent, employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden, and Murfreesboro, Tennessee, excluding all office clerical employees, managers, route managers, city salesmen, field men, professional employees, guards, watchmen, and supervisors as defined in the Act.

We will not in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to join or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of col-

*Appendix*

lective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

We will bargain collectively with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, with respect to contracting out the transport division work, including the possible restoration of the transport division, and the effects of contracting out the work of the said division upon the employees thereof.

We will put in writing and sign any agreement made as a result of such bargaining.

We will make whole the transport division employees for any loss of earnings which they may have suffered during the period from April 8, 1963 to May 6, 1963, by reason of our unilateral action in subcontracting the work of that division.

All our employees are free to become, remain, or refrain from becoming or remaining, members of the above-named or any other labor organization.

JERSEY FARMS MILK SERVICE, INC.  
(Employer)

By \_\_\_\_\_  
(Representative) (Title)

Dated \_\_\_\_\_

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This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee, 38103, (Tel. No. 534-3161), if they have any question concerning this notice or compliance with its provisions.

*United States of America  
Before the National Labor Relations Board  
Division of Trial Examiners  
Washington, D. C.*

Case No. 26-CA-1540

Jersey Farms Milk Service, Inc.	}
Respondent	
and	
Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO	
Charging Party	

*John Langley, Esq.*, of Memphis, Tenn., for the General Counsel.

*Olin White, Esq.*, of Nashville, Tenn., and *Dick Lansden, Esq.*, of Nashville, Tenn., for the Respondent.

*Ronald G. Sloan*, Secretary-treasurer and Business Representative of Charging Party, of Nashville, Tenn., and *Billy Atnip*, Assistant Business Representative of Charging Party, of Nashville, Tenn., for the Charging Party.

Before: *George L. Powell*, Trial Examiner.

**TRIAL EXAMINER'S DECISION**

**Statement of the Case**

This case, heard by Trial Examiner George L. Powell at Nashville, Tennessee, on September 4, 1963, pursuant to a charge, a first amended charge and a second amended charge filed on May 21, June 21, and July 19, 1963, respectively by

the Charging Party,<sup>1</sup> a complaint by the General Counsel filed on July 19, 1963, and an answer filed August 2, 1963, presents a single issue: whether Respondent<sup>2</sup> refused to bargain in good faith within the meaning of Section 8(a)(5) of the Act<sup>3</sup> by contracting out the work formerly performed by its Transport Division, and this action was based solely on economic considerations and not on any antiunion considerations. The defense of Respondent is that it had the right to do what it did under its present collective-bargaining contract and that the Charging Party knew Respondent was going to contract out the work before it was done and did not request bargaining over it.

The Respondent and the General Counsel made oral argument at the hearing and filed briefs with the Trial Examiner on September 24 and 25, 1963, respectively.

Upon consideration of the entire record<sup>4</sup> in this case, including the briefs of the parties, and upon my observation of each of the witnesses appearing before me, I made the following:

1. Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO.

2. *Jersey Farms Milk Service, Inc.*

3. National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq. Section 8(a)(5) of the Act is as follows:

SEC. 8(a) It shall be an unfair labor practice for an employer—  
(5) to refuse to bargain collectively with the representative of his employees, . . .

(d) For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

4. Respondent has moved to correct the record in one particular. The General Counsel agrees and the record is corrected as follows: Page 54, line 3, the words "The Witness" is changed to, "Mr. Langley."

## Findings of Fact

## I. The business of Respondent

Respondent, a Tennessee corporation, operates a plant located in Nashville, Tennessee, where it is engaged in the purchase, processing, and retail sale and distribution of milk products. During the 12-month period immediately preceding the hearing, it sold and distributed more than \$500,000 worth of its products. During the same period of time, Respondent purchased and received at its Nashville, Tennessee, plant for use in its processing, retail sale and distribution, goods and supplies valued in excess of \$50,000 directly from points outside the State of Tennessee. I find, as admitted by the parties, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. (*Siemons Mailing Service*, 122 NLRB 81.)

## II. The labor organization involved

Amalgamated Meat Cutters & Butcher Workmen of North America; Local 405, AFL-CIO, is, as admitted by the parties, a labor organization within the meaning of Section 2(5) of the Act.

## III. The alleged unfair labor practices

The facts in this matter are largely undisputed and all of the witnesses testified credibly to the facts as remembered by them.

Respondent and the Charging Party have had a pleasant collective-bargaining relationship over a period of several years in an appropriate unit composed of all of Respondent's employees employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden and Mur-

freesboro, Tennessee, excluding all office ~~general~~ employees, managers, route managers, city salesmen, ~~old~~ men, professional employees, guards, watchmen and supervisors as defined in the Act. These employees number about 120.

At the time the current contract, which runs from January 1, 1963, to December 31, 1965, was being negotiated, the three officers of Respondent, its president, vice president and secretary had discussed among themselves contracting out the work performed by the Transport Division, but no mention of this was made to the Charging Party during contract negotiations.

Leslie F. Vantrease, Sr., Respondent's president, credibly testified that the reason no mention was made to the Charging Party about the possibility of contracting out the work of the Transport Division was because his legal counsel had told him it was unnecessary being part of management's prerogative and as such was covered by Article 6 of the current agreement.

On April 8, 1963, Respondent signed a contract with Byron Ross under which Ross agreed, for a price, to do the work formerly done by six (6) employees in the Respondent's Transport Division, namely: Claude Woods, Lewis Moore, Burton Robertson, Howard Wright, Joe Helms and Ross. Ross voluntarily quit his employment with Respondent in order to sign the contract to haul. He in turn hired Wright and Helms after they, like Moore and Robertson, had been laid off by Respondent for lack of work when the Ross contract was signed.<sup>5</sup> There is no question but what the whole arrangement with Ross was a bona fide arrangement. The General Counsel stipulated that an independent contractor arrangement was set up.

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5. Moore and Robertson are still unemployed although Moore worked 3 weeks during the vacation period of Woods, who was retained by Respondent in another capacity.



The Respondent sold its equipment. It sold its stake truck on the open market and sold its two tractors and three trailers to Ross.

The Respondent was convinced that this operation would save it money. It studied cost figures which showed a savings in money and after 22 weeks of actual operation it is saving around \$230 a week.

During the week immediately preceding Monday, April 8, 1963,<sup>6</sup> Atnip accidentally met Vantrease, Jr. in a restaurant and told him that he had heard of a rumor that Respondent was going to contract out the work of the Transport Division. Vantrease, Jr. told him they "were thinking about selling the trucks to Ross or somebody but that's not official." Vantrease, Jr. admitted telling Atnip that Respondent was considering contracting the transport long-haul division to Ross and that it was accidental that the matter came up at all.<sup>7</sup>

6. Billy H. Atnip, assistant business representative of Charging Party places the time as "two or three days" before April 8, 1963, and Leslie F. Vantrease, Jr., Respondent's secretary places the time "in the neighborhood of a week" before.

7. The testimony is as follows:

Q. Did you seek out Mr. Atnip that day or did you and he just happen to be talking about something?

A. [Vantrease, Jr.] I am sure we just happened to meet and be talking about something. I really don't remember how we did meet, other than I remember that we met over at the restaurant.

Q. It was more or less accidental?

A. It was accidental. It wasn't planned on my part.

Q. And the fact that the conversation about the long haul came up is more or less an accident. This wasn't planned on your part, either?

A. No, sir.

Q. In fact, like your father Mr. Vantrease, Sr., you considered this to be a matter purely of management prerogative?

A. That is correct.

Q. And you had no intention of consulting with the union about the matter?

A. None whatsoever until after the contract was signed. . . .

On April 8, 1963, as noted earlier, Respondent did enter into the contract for the Transport Division work with Ross. Also on the same date the Charging Party wrote Respondent a letter in which it stated it . . . files a complaint which contests your right to contract Transport Drivers' work out." In the same letter it told Respondent it had no right to lay off Transport Workers so long as transport driving was required in selling products.

Further it accused Respondent of violating the agreement and insisted it stop from completing the arrangement it had heard it intended to go through with; it insisted that laid-off drivers be reemployed and no more be laid off; and it requested a meeting "at your earliest possible convenience."

Respondent did not answer the April 8 letter.

Charging Party wrote again on April 12, 1963, seeking a "negotiating meeting" and notifying Respondent that it considered Respondent to have violated Section 8(a)(5) of the Act citing as its authority the *Town & Country* case.<sup>8</sup>

On May 2, 1963, Respondent told Charging Party it would meet on May 6, 1963. On that day there was a meeting attended by representatives of both parties. Business Representative Sloan asked that the men be put back to work. Counsel for Respondent asked if Charging Party had some proposal other than putting the men back to work but there was none. The meeting broke up with Charging Party asking Respondent to think about it and call them back.

Respondent maintains that it had the right to do what it did under the management prerogative provision of Article 6 and under Article 35. Article 35 has restrictive language

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8. *Town and Country Manufacturing Company* (49 LRRM 1918).

but no restriction as to what Respondent did. These clauses are as follows:

ARTICLE 6—Management Rights

The Management of the business in all its phases and details is vested in the Employer. The Employer, however, shall comply with the terms of this agreement, and will not discriminate against any employee.

ARTICLE 35—Loading and Unloading

All present loading and unloading policies will be continued with no changes in regard to transports, retail, and wholesale trucks for the period covered by this agreement.

Respondent argues that Charging Party knew of its plans to contract out the Transport Division work to Ross both through Ross who was a steward of Charging Party and through Atnip who talked of the rumor to Vantrease, Jr. Further it argues that Charging Party must have known of the plans because it wrote a letter dated the same day the Ross contract was entered into. And knowing of its plans, Charging Party did nothing to request bargaining (the theory of Respondent being that there can be no refusal to bargain by an employer without a request by the Union) and Respondent then changed its position before it knew of Charging Party's concern.

In support of this defense, Respondent brought out the fact that in past history, somewhere between August 1 and September 16, 1960, it told Sloan, during contract negotiations, that it was going to sell its tank trucks and Sloan did not object, in fact Sloan told them they were within their rights and there no longer was a discussion on this point. Respondent sold the trucks with no complaint.

## Analysis and Decision

Law is composed of the life juices of the people.<sup>9</sup> The thrust of the recent Board<sup>10</sup> decisions, such as *Town & Country*,<sup>11</sup> is to bring management and the collective-bargaining agent of the employees closer and closer together in a respectful and respected relationship while doing their own jobs in an effort to advance the interest of both the employer and employee. This is a matter of mood, and in certain respects is like a marriage.

Going back only into the recent past, it can be remembered when women in this country had no civil rights. They could not vote for their Government. All that is past and women have a rightful place in the community. And they have a place in the home as a full-fledged partner, albeit their position is rarely exactly the same in different homes.

But we can well imagine the almost universal cry in every home in the land should the husband, without first talking it over with his wife, rent out the spare room in the home to a lovely young roomer, be she blonde, brunet or red head! The same thing is true, with perhaps a difference in degree, should the husband just sell his wife's beloved fur coat! These things just cannot be done if the "marriage" is to be kept going. The public interest in labor-management relations is to keep the parties together.

The Congress states it thusly:

It is hereby declared to be the policy of the United States . . . [to encourage] the practice and procedure of collective bargaining . . . by protecting the exercise

9. See *Felix Frankfurter Reminisces*, Reynal & Co., N. Y. 1960.

10. National Labor Relations Board.

11. *Town & Country Mfg., Inc. v. N.L.R.B.*, 316 F.2d 846 (C.A. 5). See *Fibreboard Paper Products Corp. v. N.L.R.B.*, 339 U.S. 672 (1950); *N.L.R.B. v. Katz*, 369 U.S. 736 (1962); and *N.L.R.B. v. Brown-Dunkin*, 287 F.2d 17 (C.A. 10).

by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . . .<sup>12</sup>

Following this policy, when employers unilaterally take steps which destroy in whole or in part that which the union has obtained through the processes of collective bargaining, the Board holds that the employer is not doing what he should be doing under the Act and the employer is ordered to do the proper thing. In some cases, it is even ordered to recreate the same situation as it was before it took the unilateral action. Management prerogative clauses in contracts do not go so far as to permit substantive changes in the wages, hours and terms and conditions of employment of employees in the appropriate collective-bargaining unit.

Of course, labor relations cannot really be likened to marriage. But the mood of a successful marriage, the give-and-take and the mutual respect, is the dream the Board has in mind in carrying out the public policy when it requires management to *first* bargain with the union before it takes action such as contracting out work over which it has previously bargained with the union. That is this case. The Respondent here bargained with the Union over the employees in the appropriate unit and shortly after agreeing on the terms, unilaterally changed its operations to the detriment of certain of the employees. Bargaining in good faith within the meaning of the Act is a continuing thing not stopping with the execution of a collective-bargaining agreement but continuing so long as the union is the exclusive representative of the employees.

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<sup>12</sup> Section 1, fifth paragraph of the Act.

The fact that Respondent had done a somewhat similar thing and contracted out work in 1960 with no objections by the Charging Party is certainly an ameliorating influence but it does not excuse the present action which was done after the law on the matter had developed in a different direction. The Circuit Court for the Fifth Circuit on April 29, 1963 affirmed the earlier decision of the Board in the Town & Country case, *supra*. It is appropriate at this time to set out and discuss some of the case law on the subject. In a case not yet reported, but one on all fours with the instant case, the United States Court of Appeals for the Eighth Circuit in the case *Adams Dairy, Inc.* (137 NLRB 815), Case No. 17,171, on September 12, 1963, *denied* enforcement of the Board's Order which found that the Respondent in that case had violated Section 8(a)(5) of the Act when it discharged its driver-salesmen and replaced them with independent contractors without first notifying and consulting with the employees' certified bargaining representative. The Court seemed to regard it as significant that there was no showing that the company was motivated by antiunion consideration. Additionally the Court found support for its view in the case of *Erie Resistor Corp.*, 323 U.S. 221.

The Board has now petitioned the Court for a rehearing in the matter, contending that the question of antiunion motive is completely irrelevant in the case as that would go only to a finding of a violation of Section 8(a)(3) which was not involved therein. The Board further contended that reliance upon *Erie Resistor* "misconceived the scope of that decision." The Board's brief states:

*Erie Resistor* involved a grant of superseniority to replacements for strikers and strikers who return to work during a strike, and the basic issue was whether



this policy, which by its very nature discriminated between employees on the basis of strike activity, was violative of Section 8(a)(3) and (1) of the Act irrespective of the employer's motive. The Supreme Court, although acknowledging that an antiunion motive is generally required to establish discrimination within the meaning of Section 8(a)(3), agreed with the Board that the superseniority policy was so discriminatory and so interfered with the right to strike guaranteed by Sections 7 and 13 of the Act that it violated Section 8(a)(3) even though the employer may have been motivated only by a desire to keep his plant operating. To be sure, the court further held that the company had refused to bargain in violation of Section 8(a)(5) of the Act, but this was wholly contingent upon the first finding that the superseniority policy constituted discrimination in violation of Section 8(a)(3); that is, the sole basis for the Section 8(a)(5) finding was that the employer, in contract negotiations had insisted upon including in the contract an illegal clause, one recognizing a superseniority policy which was unlawful under Section 8(a)(3).

The Board had not found in the *Adams* case that the Company had discriminated in violation of 8(a)(3) of the Act and stated in its brief for rehearing that such a finding was not required for it to make a finding of violation of Section 8(a)(5). It argued that the refusal to bargain in *Adams* did not consist of demanding an illegal clause as was the situation in *Erie Resistor* but rather consisted of taking action without notifying or consulting the bargaining representative. In the latter situation, the Board's brief argues, the employer's motive, his good or bad faith, is

irrelevant in determining whether there has been an unlawful refusal to bargain. The only questions are whether the subject is within the area of wages, hours, or other terms and conditions of employment, and whether the employer took action on that subject without first consulting with the union. Reference was made to the case of *N.L.R.B. v. Katz*, at 369 U.S. 736 where unilateral action was found to violate Section 8(a)(5) notwithstanding the employer's subjective good faith.

In some of the previous subcontracting cases like *N.L.R.B. v. Brown-Dunkin*, 387 F.2d 17 (C.A. 10) and *Town & Country. Mfg. Co., Inc. v. N.L.R.B.*, 316 F.2d 846 (C.A. 5), referred to above, the evidence showed not only that the employer failed to discuss the subcontracting issue with the union, but that the subcontracting was motivated by a desire to defeat the union rather than by economic consideration. In these circumstances, argues the Board, there are two unfair labor practices; the failure to discuss the matter with the union constitutes a refusal to bargain in violation of Section 8(a)(5), and the illegal motivation warrants the additional finding that the action was discriminatory in violation of Section 8(a)(3). However, the fact that these two unfair labor practice findings are justified in these cases does not mean that, where as here the illegal motivation which may be necessary to support an 8(a)(3) finding is lacking, the separate 8(a)(5) finding cannot be made. See *Fibreboard Paper Products Corp. v. N.L.R.B.*, 53 LRRM 3666 (C.A. D.C.) wherein the Court stated:

It is not necessary to find an antiunion animus as a credit for the conclusion that the employer violated Section 8(a)(5), which commands good-faith bargaining on wages, hours, and terms and conditions of employment.

Accordingly, applying the principles of the Board in the case at issue, a refusal to bargain finding is warranted even though the Company may have been motivated by business, rather than antiunion, consideration. The Company here acted unilaterally without prior notice to or discussion with the Union. The action taken involved a change in wages, hours, and other terms and conditions of employment, in both a literal and a very real sense. The jobs of the employees in the transport division were abolished; they lost their status as employees and were replaced by independent contractors. Such action altered their wages, hours and other terms and conditions of employment to a far greater extent than if the Respondent had merely reduced wages or increased working hours. There is no question that these lesser changes are bargainable matters to which unilateral action by the Employer is precluded. *A fortiori*, the same conclusion should follow with respect to the more drastic changes in employee status which flow from a decision to eliminate employees' jobs altogether.<sup>13</sup> Accordingly, I find that Respondent, by failing to notify and bargain with the Union about the change to an independent contractor system before putting it into effect, violated the requirements of Section 8(a)(5) of the Act, irrespective of the Company's motive.<sup>14</sup>

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13. Of course, this does not mean that the Employer cannot contract out an operation unless the Union approves. It merely means that the Employer must afford the Union a reasonable opportunity to bargain about the proposed action before he makes a final decision.

14. Respondent contends in its brief that it did not act unilaterally "without prior notice to or discussion with the union" inasmuch as sometime prior to April 8, the date of the independent contract, "... the Respondent's corporate secretary, who handles labor relations for the Respondent, talked to the Union's assistant business agent, Mr. Atnip, and advised Mr. Atnip that the Respondent was considering making a change in the transportation division,

Having found that Respondent failed to bargain in good faith within the meaning of Section 8(a)(5) of the Act when it contracted out the work of the Transport Division without first meeting with and bargaining with the Charging Party herein, I find further that Section 8(a)(1) is violated inasmuch as it always is derivatively violated with a violation of Section 8(a)(5).

#### IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes

that is contracting out long haul work." At a point later on its brief, Respondent referred to this meeting between the two men identified above as a "conference." The facts on the contrary, indicate that this meeting is no "conference." Neither of the two parties could testify exactly as to when the meeting took place one testifying that it was some "3 to 5 days before" and the other a week before the contract was signed. This indicates a lack of importance in the meeting. Further, Atnip had heard rumors about the work being contracted out so when he found the company representative in a nearby restaurant he asked him about it. In his inquiry, Vantrease, Jr. replied, . . . "we are thinking about selling the trucks to Ross or somebody, but that's not official." Also according to Vantrease, Jr., he told Atnip that Respondent was *considering* contracting the transport long-haul division to Ross. Also Vantrease, Jr., admitted that it was accidental that the matter came up at all and that he would not bargain with Respondent over this as he believed he had the right to contract out the work under the present contract.

Laying aside for the moment Respondent's position that its management prerogative clause gave it the right to take this unilateral action and considering only the proposition that notice and discussion had been held with the Union before the action was taken, it also lacks merit under the facts. Here there were mere rumors. If checking out rumors were to acquire the standing of bargaining collectively it is conceivable that management and labor could be devoting the bulk of their time checking out rumors rather than engaging in constructive, mutually trustful endeavors.

burdening and obstructing commerce and the free flow of commerce.

### Conclusions of Law

1. The Charging Party is the duly selected collective bargaining agent for the employees in an appropriate unit designated as follows:

All employees of Respondent, employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden and Murfreesboro, Tennessee, excluding all office clerical employees, managers, route managers, city salesmen, field men, professional employees, guards, watchmen and supervisors as defined in the Act.

By unilaterally contracting out the work of the Transport Division, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

### The Remedy

Having found that Respondent has violated Section 8(a)(5) and (1) of the Act, I will order it to cease and desist from any like or related conduct.

However, as the record shows that Respondent was motivated solely by economic considerations; that the blessings of these economies were actually received in the passage of time since the contracting of the work, and that contracting out work without bargaining had been done in the past, I will not order Respondent to cancel its contract with Ross and rehire the five former employees and go back to its former practice of doing its own hauling. All the trucks and

tractors have been sold off. Respondent would be put at great expense to create the situation as it was before its contract with Ross, and, even if that were to be done the results of bargaining collectively with the Charging Party might well result in again selling the equipment and contracting out the work. Obviously money would be lost in either or both transactions. Under these circumstances such loss would be wasteful and not constructive. It would seem to penalize both the Employer and the employees. I believe it would be more equitable for the Respondent to be ordered to now bargain with the Charging Party over the matter and to carry out whatever arrangements were agreed upon as a result of this collective bargaining. As the action of Respondent in unilaterally carving out part of the collective-bargaining unit has an impact on the whole wage structure, it materially breached the agreement.

Also because of this breach and in addition to the preceding paragraph, I will order Respondent to bargain with the Charging Party upon so much of the wages, hours and terms and conditions of employment of all employees in the unit as the Charging Party requests and, if necessary, agree to a wholly new collective-bargaining agreement.

It is recognized that man should reach for more than he can grab, and, on the other hand, that he be forced to give up some of that he had when interests of the public are put into the balance. Both parties in this matter seem very familiar with the law which in one aspect holds that good-faith collective bargaining does not require the making of concessions.

### RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I



recommend that the Respondent, Jersey Farms Milk Service, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from unilaterally contracting out work or unilaterally taking any action relating to the terms and conditions of employment, such matters being mandatory subjects of collective bargaining within the meaning of Section 8(a)(5) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Bargain with the Charging Party with respect to the contracting out of the Transport Division.

(b) Bargain with the Charging Party over so much of the wages, hours, and terms and conditions of employment in the bargaining unit as requested by the Charging Party as if the present collective-bargaining agreement between the parties were not in effect.

(c) Put in writing and sign any agreement made as a result of such bargaining, and

(d) Post in its plant in Nashville, Tennessee, copies of the notice attached hereto and marked Appendix.<sup>15</sup> Copies of such notice, to be furnished by the Regional Director for the Twenty-sixth Region, shall after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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15. If these Recommendations are adopted by the Board, the words, "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

(e) Notify the Regional Director for the Twenty-sixth Region, in writing within 20 days from the date of the receipt of this Decision what steps the Respondent has taken to comply herewith.<sup>10</sup>

Dated at Washington, D. C.

/s/ GEORGE L. POWELL

George L. Powell

Trial Examiner

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16. If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-sixth Region, in writing within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

As Recommended by a Trial Examiner of  
The National Labor Relations Board

We are posting this notice to inform our employees of the rights guaranteed them in the National Labor Relations Act:

We will not contract out work without first bargaining over it with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, or any other labor union which may represent an appropriate unit of our employees.

All our employees have the right to form, join, or assist any labor union, or not to do so. We will not interfere with our employees in the exercise of these rights.

We will bargain with Amalgamated Meat Cutters & Butcher Workmen of North America, Local 405, AFL-CIO, over wages, hours and other terms and conditions of employment in the unit composed of

All employees of Respondent, employed at Nashville, Gallatin, Cookeville, McMinnville, Tullahoma, Shelbyville, Columbia, Lawrenceburg, Hohenwald, Dickson, Clarksville, Camden and Murfreesboro, Tennessee, excluding all office clerical employees, managers, route managers, city salesmen, field men, professional employees, guards, watchmen and supervisors as defined in the Act.

and will reduce to writing and sign any agreement entered into as a result of such bargaining.

AMALGAMATED MEAT CUTTERS & BUTCHER  
WORKMEN OF NORTH AMERICA,  
LOCAL 405, AFL-CIO  
(Labor Organization)

By \_\_\_\_\_  
(Representative) (Title)

Dated \_\_\_\_\_

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This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103 (Tel. No. 534-3161), if they have any questions concerning this notice or compliance with its provisions.